Supreme Court, U.S.
FILED

No. 961585

APR 2 1997
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1996

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage; ARLENE ROUSE YELVERTON; ROBERT YELVERTON; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks,

Petitioners,

v.

GRAYHAM KEESLER; DANIEL PETERS; JAMES P. MORGAN; CHESTER HILL; and CITY OF GOLDSBORO, NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James K. Dorsett, III*
***Counsel of Record**
Steven M. Sartorio
Zebulon D. Anderson
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602-2611
(919) 821-1220

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

88pp

QUESTIONS PRESENTED

I. Is a police officer, who is standing within two to three feet of a rapidly moving vehicle driven by a fleeing felony suspect when he uses deadly force to apprehend that suspect, qualifiedly immune from suit regardless of the suspect's known background and history, regardless of the movement and location of the officer at the time deadly force is utilized, and regardless of the fact that the vehicle is moving away from the officer?

II. When considering an interlocutory appeal from an order denying a defendant's motion for summary judgment based on a qualified immunity defense, may the appellate court disregard the lower court's determination that, considering the facts in the light most favorable to the plaintiff, the defendant officer did not have probable cause to believe that his life or the lives of others were in danger at the time he used deadly force to apprehend a fleeing felony suspect?

III. Does a police officer violate the Fourth Amendment of the United States Constitution when he runs beside and shoots into the driver's-side window of a pickup truck being driven away from the officer by a felony suspect?

PARTIES BELOW

Leonard Edmundson, Administrator of the Estate of James Richard Turnage; Alene Rouse Yelverton; Robert Yelverton; Erin Jannell Shirley, a minor, by and through her guardian, Janice Stocks
Petitioners
By: James K. Dorsett, III
Steven M. Sartorio
Zebulon D. Anderson
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602-2611
(919) 821-1220

Craig Yelverton; Karen Bennett; Kathy Edmundson; and Libby Peele
Other Plaintiffs
By: James K. Dorsett, III
Steven M. Sartorio
Zebulon D. Anderson
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602-2611
(919) 821-1220

Grayham Keesler; Daniel Peters; James P. Morgan; Chester Hill; and City of Goldsboro, North Carolina
Respondents
By: Mr. Kenneth R. Wooten
Mr. John R. Green, Jr.
WARD AND SMITH, P.A.
Post Office Box 867
New Bern, North Carolina 28563-0867

City of Goldsboro Police Department
Other Defendant
By: Mr. Kenneth R. Wooten
Mr. John R. Green, Jr.
WARD AND SMITH, P.A.
Post Office Box 867
New Bern, North Carolina 28563-0867

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF CASE 1

A. Nature of Case 1
B. Statement of Facts 2
C. Proceedings Below 4

REASONS FOR GRANTING THE PETITION 9

I. The Decision of the Fourth Circuit in this Case Conflicts With the Decisions of the Seventh Circuit and the Ninth Circuit. 10

II. The Decision of the Fourth Circuit in this Case Conflicts With the Decision of this Court in Johnson v. Jones. 16

III. The Decision of the Fourth Circuit in this Case Conflicts With the Decision of this Court in Tennessee v. Garner 19

IV. The Decision of the Fourth Circuit in this Case is Erroneous and the Questions Presented by the Decision Are Important. 21

CONCLUSION 23

APPENDIX A (Fourth Circuit Order of 11/27/96) ..... App. 1

APPENDIX B (District Court Order of 11/2/95 ..... App. 17

APPENDIX C (Fourth Circuit Order of 1/2/97) ..... App. 26

APPENDIX D (Fourth Circuit Order of 3/28/96) ..... App. 29

APPENDIX E (Fourth Circuit Corrected Order of 3/28/96) ..... App. 31

APPENDIX F (District Court Order of 1/9/96) .. App. 33

APPENDIX G (Ginn Affidavit) ..... App. 44

APPENDIX H (Tyson Affidavit) ..... App. 51

TABLE OF AUTHORITIES

Pages:

Cases:

Acosta v. City and County of San Francisco, 83 F.3d 1143 (9th Cir.), cert. denied, 117 S. Ct. 514, 136 L. Ed. 2d 403 (1996) 11, 14-16

Buonocore v. Harris, 65 F.3d 347 (1995) 10

Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) 7

Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) 11-14

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 9

Johnson v. Jones, ___ U.S. ___, 15 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) 8, 16, 18

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 ..... 9, 10

Pittman v. Nelms, 87 F.3d 116 (4th Cir. 1996) 7, 9

Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) 9

Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) 8, 19-21

OPINIONS BELOW

The opinion of the court of appeals is reported in full text format at 1996 U.S. App. LEXIS 30889 (4th Cir. Nov. 27, 1996) (unpublished) and is reported in table case format at 103 F.3d 117 (4th Cir. 1996). (App. 1.) The opinion of the district court is reported at 904 F. Supp. 478 (E.D.N.C. 1995). (App. 17.)

JURISDICTION

The court of appeals entered its decision on November 27, 1996. (App. 1.) On January 2, 1997 the court of appeals denied the petitioners' Petition for Rehearing and Suggestion for Rehearing *In Banc*. (App. 26.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

A. Nature of Case

On July 2, 1992, Grayham Keesler and Daniel Peters were acting in the course and scope of their employment by the City of Goldsboro and under the supervision of James P. Morgan and Chester Hill when they brutally shot and killed James Richard Turnage while attempting to serve an arrest warrant for his alleged possession of 6.8 grams of marijuana with the intent to sell five months earlier. The evidence offered by the petitioners, including eyewitness affidavits, demonstrates that Turnage had neither a criminal record nor a history of violence and that neither Keesler and

Peters nor anyone else was in danger of being killed or seriously injured at the time Turnage was shot and killed. An eyewitness affidavit shows that Keesler, while in no personal danger, ran beside and shot into the driver's-side window of the pickup truck driven by Turnage as he attempted to drive away.

In its November 27, 1996 opinion, the Fourth Circuit concluded, 2-1, that Keesler and Peters acted reasonably and were entitled to qualified immunity because Keesler was "in serious danger of injury," being "within 2 to 3 feet of a rapidly moving truck" when they shot and killed Turnage as he drove away. The Fourth Circuit reached this conclusion despite the fact that the district court found that neither Keesler nor Peters was in danger at the time they shot and killed Turnage.

B. Statement of Facts

On July 2, 1992, Turnage was a 36-year old male employed by the Franklin Baking Company in Goldsboro, North Carolina. He had neither a criminal record nor a history of violence.

That day, Keesler and Peters traveled to the Franklin Baking Company to serve an arrest warrant on Turnage for the alleged sale of 6.8 grams of marijuana five months earlier. When confronted by Keesler and Peters, Turnage asked if he could finish unloading his delivery truck, and the officers acceded to his request. Roughly forty minutes later, while Keesler and Peters were conversing with Turnage's supervisors, Lionel Ginn and Scott Tyson, Turnage ran out of the warehouse and

into the parking lot in which his pickup truck was parked. The officers followed with guns drawn.

Turnage entered his truck, locked the doors, and started the engine. Keesler, with his gun in hand, was at the passenger side of the truck, trying to open the door and yelling for Turnage to stop. Turnage backed up his truck in a semi-circular manner so that the front of the truck was facing the gate exiting the parking lot. Keesler followed the truck as Turnage drove it backwards, establishing himself in a position near the front corner of the truck, on the driver's side, two to three feet away. Turnage then drove his truck forward and rightward away from Keesler and towards the gate leaving the parking lot. The motion of the truck and Keesler's movements put Keesler to the driver's side of the truck, completely out of the truck's way, as it moved forward and rightward toward the gate. As Turnage began to drive away, Keesler shot his gun toward Turnage. As Turnage continued driving away from Keesler, Keesler ran beside the truck and shot into the driver's-side window two or three more times.

During this incident, Keesler never fell, was never hit by the truck, and was never in danger. While neither Tyson nor Ginn precisely saw Peters' location, Peters was never behind Turnage's truck and was never in danger of being hit. Neither officer nor anyone else was in danger of serious bodily injury from Turnage or his truck before, when, or after the officers shot and killed Mr. Turnage as he attempted to drive away.

C. Proceedings Below

On July 1, 1994, the petitioners filed their Complaint, initiating this civil action.[1] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and § 1343(a).

On November 9, 1994, the district court entered an order staying discovery to permit the respondents to seek an order from the court that the individual respondents were entitled to a qualified immunity from suit. The respondents filed a motion for summary judgment, and the petitioners opposed the motion, submitting affidavits from eyewitnesses Scott Tyson and Lionel Ginn. (App. 44, 51.)

In an order filed on November 6, 1995, the district court denied the respondents' motion for summary judgment. (App. 17.) The court examined the

---

[1] On January 11, 1996, the district court entered an order dismissing several claims asserted in the Complaint and establishing that only the following claims remained viable in this action: (1) the Estate's claims against the individual defendants and the City of Goldsboro for violations of the Fourth Amendment, (2) the Estate's claims of wrongful death against the individual defendants and the City of Goldsboro, and (3) Alene Yelverton, Robert Yelverton, and Erin Shirley's claims of desecration of body against the City of Goldsboro. (App. ___.) Because the court's order eliminated the claims of Craig Yelverton, Karen Bennett, Kathy Edmundson, and Libby Peele, those plaintiffs are not included as petitioners in this petition, and because the order eliminated all claims against the City of Goldsboro Police Department, the City of Goldsboro Police Department is not included as a respondent in this petition.

facts in the light most favorable to the petitioners, relying upon the affidavits of Ginn and Tyson in reaching its decision. In his affidavit, Ginn states as follows:

> Mr. Turnage then began to drive his truck forward and rightward towards the gate leaving the parking lot. The motion of the pickup truck and Officer Keesler's movements put Officer Keesler to the right side/driver's side of the truck. At this point and time, Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing, I could not believe Officer Keesler shot Mr. Turnage.

(App. 44.) In his affidavit, Tyson states as follows:

> Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit.

(App. 51.)

Relying on these affidavits, the court concluded that no reasonable officer in the position of Keesler and Peters could have believed that he had probable cause to believe that Turnage posed a significant threat of death or serious physical injury and, therefore, rejected the respondents' qualified immunity defense and denied their motion for summary judgment.

The respondents filed interlocutory appeals which the petitioners moved to dismiss for lack of jurisdiction. The Fourth Circuit denied the petitioners' motion, 2-1. (App. 29, 31.)

On November 27, 1996, the Fourth Circuit vacated the district court's order denying the respondents' motion for summary judgment and remanded the case with instructions to the district court to enter judgment in favor of the respondents on the constitutional claims and to dismiss the state law claims without prejudice. (App. 1.) Judge Hall wrote a dissenting opinion. On January 2, 1997, the court denied the petitioners' Petition for Rehearing and Suggestion for Rehearing *In Banc*. (App. 26.)

In its November 27, 1996 opinion, the Fourth Circuit asserted that "[b]ecause this interlocutory appeal concerns the issue of whether, based on the facts viewed in a light most favorable to the plaintiff, the officers' conduct violated clearly established law, we have jurisdiction." Thus, the issue before the court was

whether Keesler's and Peters' conduct violated clearly established law. The court recognized that the legal standard governing the use of deadly force by police officers to apprehend fleeing felony suspects was clearly established at the time Turnage was shot and killed. The court then turned to the issue of whether Keesler and Peters had violated this clearly established legal standard.

The court examined the affidavits of Ginn and Tyson and concluded as follows:

> Even in this light, the officers were entitled to qualified immunity because at the moment when Keesler used deadly force against Turnage, it was objectively reasonable for Keesler to view the use of deadly force as not excessive when considering the extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck.

The court asserted that this case was nearly indistinguishable from two previous decisions of the Fourth Circuit: Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) and Pittman v. Nelms, 87 F.3d 116 (4th Cir. 1996). The court asserted that "as in Drewitt and Pittman, an officer, here Keesler, was in serious danger of injury--Keesler was within 2 to 3 feet of a rapidly moving truck." Based on these facts, the court concluded, as a matter of law, that Keesler and Peters "acted reasonably," that their conduct did not violate the

Constitution, and that, therefore, they were entitled to a qualified immunity.

In his dissenting opinion, Judge Hall agreed that the relevant legal standard was clearly established, citing Tennessee v. Garner, 471 U.S. 1 (1985). Judge Hall described the decision of the district court as follows:

> In other words, the district court felt that the picture painted by Ginn and Tyson was that Keesler ran alongside the truck as it was pulling away from him, and that a permissible inference from this picture was that the shots were fired solely to stop the fleeing Turnage. Under what I think we all agree was the established law, this is a picture of excessive force.

Judge Hall pointed out that the majority ignored the factual determinations made by the district court, substituting its interpretation of the record for that of the district court and reducing "the picture drawn by the plaintiff to 'extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck.'" By ignoring the factual determinations made by the district court, Judge Hall believed that the district exceeded its authority in this interlocutory appeal, citing Johnson v. Jones, 115 S. Ct. 2151 (1995).

REASONS FOR GRANTING THE PETITION

Beginning with Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982), this Court has defined the framework for analyzing a qualified immunity defense. See also Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). These decisions indicate that the analysis of a qualified immunity defense should proceed upon two levels. See, e.g., Pittman v. Nelms, 87 F.3d 116, 118-19 (4th Cir. 1996). The first level of analysis asks whether the defendant's conduct violated a constitutional right of the plaintiff, and the second level of the analysis asks whether the defendant is, nevertheless, entitled to a qualified immunity from suit. See, e.g., id. Although conceptually the immunity level of the analysis is reached only if it has first been determined that the defendant violated a constitutional right of the plaintiff, defendants usually raise the immunity issue preliminarily, before a determination has been made whether the defendant violated a constitutional right of the plaintiff. See, e.g., id.

When confronted with a qualified immunity defense that has been asserted preliminarily in a motion for summary judgment, the trial court may combine the constitutional inquiry with the immunity inquiry by asking whether the plaintiff has "alleged the violation of a clearly established constitutional right." See Siegert, 500 U.S. at 231, 111 S. Ct. at 1793-94, 114 L. Ed. 2d at ___; Pittman, 87 F.3d at 119. In answering this question, the court must consider the facts in the light most favorable

to the plaintiff and deny the motion if genuine issues of material fact exist. See, e.g., Buonocore v. Harris, 65 F.3d 347, 359-60 (1995); see also Mitchell, 472 U.S. at 526, 105 S. Ct. at 2815, 86 L. Ed. 2d at ____.

In the instant case, the Fourth Circuit stated that the issue before it was "whether, based on the facts viewed in the light most favorable to the plaintiff, the officers' conduct violated clearly established law." The court concluded that the legal standards governing Keesler's and Peters' conduct were clearly established. The remaining issue before the court was the constitutional component of the analysis--whether Keesler's and Peters' conduct, considered in the light most favorable to the petitioners, was unconstitutional.

In its decision, the Fourth Circuit erroneously concluded that Keesler's and Peters' conduct was objectively reasonable and did not violate Turnage's constitutional rights and that, therefore, Keesler and Peters were entitled to a qualified immunity. In reaching this erroneous conclusion, the Fourth Circuit's decision is inconsistent with decisions of this Court, the Seventh Circuit, and the Ninth Circuit and raises important issues that should be addressed by this Court.

I. The Decision of the Fourth Circuit in this Case Conflicts With Decisions of the Seventh Circuit and the Ninth Circuit.

In its opinion, the Fourth Circuit held that a police officer who runs beside and shoots into the driver's-side window of a vehicle being driven away from

the officer by a felony suspect who, as the officer knows, has no previous criminal record is entitled to a qualified immunity. The court concluded that a police officer who is "within 2 to 3 feet of a rapidly moving truck" driven by a fleeing felony suspect and who uses deadly force to apprehend that suspect is entitled to a qualified immunity from suit regardless of the suspect's known background and history, regardless of the movement and location of the officer at the time deadly force is utilized, and regardless of the fact that the truck is moving away from the officer. In reaching this conclusion, the decision of the Fourth Circuit is inconsistent with the decision of the Seventh Circuit in Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) and the decision of the Ninth Circuit in Acosta v. City and County of San Francisco, 83 F.3d 1143 (9th Cir. 1996).

Estate of Starks v. Enyart involved facts similar to those in the instant case. Starks stole a taxicab and drove it to a Taco Bell, parking it on the passenger side of another car. Officer Enyart, spotting the stolen taxicab, parked his police car six to eight feet behind it. Officers Black and Shaffer also pulled into the parking lot, parking their car behind Enyart's car. The three police officers approached Starks' vehicle, with Black moving to the front, Shaffer moving to the rear, and Enyart approaching the driver's door. As Enyart began to open the door, Starks grabbed it with both hands, slammed it shut, and locked all of the doors. He put the car in reverse and backed the cab into Enyart's police car. He then drove forward and toward the right, but his path was blocked by a utility pole, behind which stood Black. Starks reversed again to improve the angle of the cab to the pole. Starks then put the cab in drive

and floored the accelerator. He would have cleared the pole and escaped, but, at some point, Black moved in front of the vehicle and shot and killed Starks.

The plaintiff sued the police officers for violating Starks' constitutional rights. The district court denied the defendants' motion for summary judgment that was based on a qualified immunity defense, and the defendants appealed. The Seventh Circuit concluded that, apart from Black's appearance at the front of cab, the police officers were not entitled to a qualified immunity, stating as follows:

> The defendants knew that the underlying crime was not accomplished violently. They also knew that Starks was attempting to escape in the face of a clear show of authority by the police. But his escape attempt did not involve menacing a police officer or civilian with a weapon – at least not until Black stepped into the path of a car that had just begun to accelerate quickly. The defendants' argument that Starks was operating the cab recklessly does not comport with the plaintiffs' version of the facts. Accepting the plaintiffs' version, as we must at this juncture, his attempt to maneuver the cab was not so reckless that, apart from Black's appearance at the front of the cab, police officers could reasonably fear for their safety or the safety of the community. Therefore, it cannot be concluded that a reasonable officer could believe that Starks fit the description of a fleeing felon against whom deadly force could legitimately be used.

Id. at 233. The court further concluded that despite the fact that Black was in front of the vehicle at the time he shot, he was not entitled to a qualified immunity because the plaintiff's evidence showed that Black moved in front of the cab without leaving Starks time to stop. Finally, the court also recognized that summary judgment was inappropriate because the evidence did not conclusively establish that the cab presented a threat of serious physical harm, stating as follows:

> First, Black moved out of the path of the car without being struck. Second, it is unclear how fast the cab was moving, even with a floored accelerator, from a full stop after less than ten feet. These facts should also be settled by the fact finder.

Id. at 234 n.1.

Thus, contrary to the decision of the Fourth Circuit in this case, the Seventh Circuit has concluded that a police officer is not entitled to a qualified immunity simply because he was within two to three feet of a moving vehicle. Other facts are relevant to the determination of whether an officer is entitled to immunity, including the direction in which the vehicle was moving, the speed at which the vehicle was moving, whether the underlying crime was accomplished violently, whether the escape involved menacing a police officer or a civilian with a weapon, and whether the officer could have safely moved out of the way of the vehicle. The Seventh Circuit specifically concluded that a police officer may not be entitled to a qualified immunity even if he shoots a fleeing felony suspect from a position near to and in front

of a moving vehicle. Contrary to the Seventh Circuit, the Fourth Circuit concluded that officers are entitled to a qualified immunity when they use deadly force to apprehend a fleeing felony suspect, despite evidence that they were not in the path of the vehicle and were in no physical danger.

The Fourth Circuit's decision is also inconsistent with Acosta v. City and County of San Francisco, a case which is factually similar to the instant case. Officer Yawczak was standing in front of his car when he heard a woman scream and saw two young men, Pecson and Silva, running with what he believed to be a purse. Yawczak drew his gun and chased Pecson and Silva around the block. Pecson and Silva got into a waiting car driven by Acosta. The parties' evidence conflicted regarding what happened next, but evidence was presented that Yawczak moved to a position in front of the vehicle and shot and killed Acosta when the vehicle began to move forward, despite the fact that the position of the officer, the speed of the vehicle, and the direction of the vehicle would have permitted Yawczak to step to the side of the vehicle and avoid injury.

The jury returned a verdict in favor of the plaintiffs, finding that Yawczak violated Acosta's constitutional rights by using excessive force against him. Thereafter, the district court granted Yawczak's motion for judgment notwithstanding the verdict on the merits as a matter of law and on the ground of qualified immunity. The plaintiffs appealed.

The court recognized that several factual issues were relevant to the excessive force and qualified immunity issues, stating as follows:

> The jury in this case was faced with conflicting evidence regarding various factual issues. Among them were: whether one of the passengers said "run him over" prior to Yawczak's first shot at Acosta; whether Yawczak saw Acosta move the car transmission lever into gear; whether the car was moving in the direction of Yawczak prior to the first shot; if the car was moving, how fast; and Yawczak's location at the time he fired the shots.

Id. at 1146. The court noted that the district court apparently based its decision on the fact that it believed that Acosta had moved forward prior to Yawczak firing the shot that killed Acosta. The court, however, concluded that even if Acosta had moved forward before Yawczak shot, Yawczak may have used excessive force when he shot and killed Acosta, stating as follows:

> On the basis of the evidence presented at trial, the jury could have reasonably concluded that a reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead-center of the car, would have recognized that he could avoid being injured when the car moved slowly, by simply stepping to the side. In short, a juror could have reasonably reached the conclusion at which the jury appears to have arrived: that the car did move prior to Yawczak's shooting Acosta but that it was moving or rolling sufficiently slowly that a reasonable officer in Yawczak's position

would not have perceived himself to be in danger of serious bodily harm.

Id. at 1146-47.

Thus, like the Seventh Circuit and unlike the Fourth Circuit, the Ninth Circuit has concluded a police officer is not entitled to a qualified immunity simply because he is within two to three feet of a moving vehicle. Other facts, such as the direction in which the vehicle was moving, the speed at which the vehicle was moving, and whether the officer could have safely moved out of the way of the vehicle, are relevant to the determination of whether the officer used excessive force or is entitled to a qualified immunity.

II. The Decision of the Fourth Circuit Conflicts With the Decision of this Court in Johnson v. Jones.

In Johnson v. Jones, this Court limited the issues that may be reviewed by an appellate court in an interlocutory appeal from the denial of a motion for summary judgment that was based on a qualified immunity defense. Specifically, the Court concluded that in such an appeal, the appellate court may review whether "a given set of facts violates clearly established law." ____ U.S. ___, ___, 115 S. Ct. 2151, 2159, 132 L. Ed. 2d 238, ___ (1995). The appellate court may not, however, review factual determinations made by the district court and may not substitute its interpretation of the affidavits submitted for that of the district court. See id.

In its opinion, the Fourth Circuit concluded that Keesler and Peters were entitled to a qualified immunity because their actions were not unconstitutional. Specifically, the court concluded the officers' conduct was objectively reasonable because Keesler "was in serious danger of injury" during this incident, as he was "within two to three feet of a rapidly moving truck." In reaching this conclusion, however, the Fourth Circuit did not rely upon the facts that were found by the district court and that were contained in the affidavits submitted by the plaintiffs.

In his affidavit, Lionel Ginn states as follows:

> Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. . . . As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage.

Similarly, in his affidavit, Scott Tyson states as follows:

> Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was

moving away from him and toward the parking lot exit.

Considering these affidavits in the light most favorable to the plaintiffs, the district court determined that Turnage backed his truck in a semi-circular manner, positioning his truck so that it pointed in the direction of the parking lot gate leading to the public street. Keesler "followed the truck placing himself two to four feet from the front corner on the driver's side." From this stopped position, Turnage then began to drive away from Keesler. The court did not conclude that the truck was rapidly moving, but merely that it was accelerating from a stationary position. Keesler then fired his gun toward Turnage and "ran up beside the truck shooting again into the driver's side window." Contrary to the facts relied upon by the Fourth Circuit in reaching its decision, the district court determined that Keesler was not in serious danger of injury during this incident because he was standing several feet from truck as it drove away.

As Judge Hall recognized in his dissenting opinion, although the majority may have disagreed with the factual determinations made by the district court when it denied the defendants' motion for summary judgment, the Fourth Circuit, under Johnson v. Jones, was bound by those determinations. Accordingly, when the Fourth Circuit disregarded the factual determinations made by the district court and based its decision on a different set of facts, most significantly its contrary determination that Keesler was in serious danger, the Fourth Circuit exceeded the scope of its appellate jurisdiction in this interlocutory appeal.

The Fourth Circuit's disregard of the facts found by the district court is particularly significant in this case because if, as stated in the affidavits submitted by the petitioners and as found by the district court, Keesler shot Turnage as he was driving away from Keesler, leaving Keesler out of danger, Keesler violated Turnage's clearly established constitutional rights. As stated by Judge Hall, "[u]nder what . . . we all agree was the established law, this is a picture of excessive force."

III. The Decision of the Fourth Circuit Conflicts With the Decision of this Court in Tennessee v. Garner.

In its opinion, the Fourth Circuit concluded that Keesler and Peters were entitled to a qualified immunity because they did not violate the constitutional rights of Turnage. Specifically, the Court concluded that when Keesler ran beside and shot into the driver's-side window of the pickup truck that was being driven away from him, Keesler "acted reasonably." The Fourth Circuit did not simply hold that, regardless of whether the officers violated Turnage's constitutional rights, they were, nevertheless, entitled to a qualified immunity from suit. Instead, the Fourth Circuit held that the officers acted reasonably and did not violate the constitution.

In reaching this conclusion, the Fourth Circuit's decision is inconsistent with Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). In Garner, this Court held as follows:

> This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Id. at 3, 105 S. Ct. at 1697, 85 L. Ed. 2d at 4. This Court further stated the following:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11, 105 S. Ct. at 1701, 85 L. Ed. 2d at 9-10.

In the instant case, the Fourth Circuit has concluded that any time a police officer is "within 2 to 3 feet of a rapidly moving truck" being driven by a fleeing felony suspect, the police officer is entitled to use deadly force to apprehend the suspect. Even if the fleeing suspect is driving away from the police officer, the police officer is running beside the vehicle shooting into the driver's-side window to prevent the escape, and eyewitnesses testify that the police officer was never in danger of being hit by the vehicle, under the decision of the Fourth Circuit in this case, the police officer is entitled to use deadly force. This decision is inconsistent with Garner.

IV. The Decision of the Fourth Circuit is Erroneous and the Questions Presented by the Decision Are Important.

The Fourth Circuit's decision is erroneous in three respects. First, the court erroneously concludes that a police officer who runs beside and shoots into the driver's-side window of a vehicle being driven away from the officer by a fleeing felony suspect who, as the officer is aware, has no criminal record is entitled to a qualified immunity even if eyewitness affidavits state that the police officer was never in serious danger. Second, as noted by Judge Hall in his dissenting opinion, the Fourth Circuit erroneously disregarded the district court's determination that neither Keesler and Peters nor anyone else was in danger at the time the officers shot and killed Turnage and that no reasonable officer in the position of Keesler and Peters could have believed that Keesler was in danger. Finally, the Fourth Circuit erroneously

concluded that a police officer who runs beside and shoots into the driver's-side window of a vehicle that is being driven away from the officer by a fleeing felony suspect has acted reasonably and has not violated the constitutional rights of the suspect, despite the fact that, considering the facts in the light most favorable to the plaintiff, the officer was not in danger at the time of the shooting.

It is important that this Court address the issues raised by and cure the errors in the Fourth Circuit's decision. This decision is inconsistent with previous decisions of this Court and decisions of other circuits. Moreover, this case sets a dangerous precedent that is an extreme departure from prior law and permits police officers to use deadly force under circumstances previously unrecognized.

Under the Fourth Circuit's rule in this case, a police officer may use deadly force to apprehend felony suspects who are fleeing by vehicle any time a police officer is within two to three feet of the vehicle, regardless of the suspect's known background and history, regardless of the movements and location of the officer at the time deadly force is utilized, and regardless of the fact that the vehicle is moving away from the officer. Under the Fourth Circuit's rule, not only is the officer in this situation entitled to a qualified immunity from suit, but the officer has not violated the constitutional rights of the suspect. The qualified immunity has become absolute.

Following the decision in this case, a police officer in the Fourth Circuit can use deadly force to apprehend any felony suspect who attempts to drive away from the officer. An officer who becomes angry and embarrassed when a suspect attempts to flee and uses deadly force to apprehend the suspect will be entitled to an immunity from suit as long as he submits an affidavit, which cannot be challenged through discovery, stating that he feared for his life at the time. The officer will be immune from suit even if eyewitnesses provide affidavits stating that the officer was never in danger.

In sum, the Fourth Circuit has rendered a decision that is contrary to law, that sets dangerous precedent, and that this Court should consider and reverse.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

James K. Dorsett, III
Counsel of Record
Steven M. Sartorio
Zebulon D. Anderson
SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602
(919) 821-1220

CERTIFICATE OF SERVICE

I certify that on this 2nd day of April, 1997, pursuant to counsel's instructions, I mailed by certified mail, return receipt requested, FORTY (40) copies of the foregoing Petition for Writ of Certiorari and Appendix to Writ to the Clerk's Office of the Supreme Court of the United States, and mailed by first class United States mail, postage prepaid, THREE (3) copies to all counsel of record:

Kenneth R. Wooten, Esquire
John R. Green, Esquire
WARD AND SMITH, P.A.
Post Office Box 867
New Bern, North Carolina 28563-0867

Counsel for Grayham Keesler; Daniel Peters; James P. Morgan; Chester Hill; and City of Goldsboro, North Carolina

Kenneth R. Wooten, Esquire
John R. Green, Esquire
WARD AND SMITH, P.A.
Post Office Box 867
New Bern, North Carolina 28563-0867

Counsel for City of Goldsboro Police Department

Barbara E. Grove, President
Lawyers Printing, Inc.
701 East Franklin Street
Richmond, Virginia 23219
(804) 648-3664

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs-Appellees,

v.

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants-Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,

Defendants.

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE;ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs-Appellees,

v.

CITY OF GOLDSBORO,

Defendant-Appellant,

and

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department; THE CITY OF GOLDSBORO POLICE DEPARTMENT,

Defendants.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh,
Terrence W. Boyle, District Judge.
(CA-94-467-5-B0(3))

Argued: September 26, 1996
Decided: November 27, 1996

Before HALL, NIEMEYER, and HAMILTON,
Circuit Judges.

Vacated and remanded with instructions by unpublished opinion. Judge Hamilton wrote the majority opinion, in which Judge Niemeyer joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellants. Zebulon Dyer Anderson, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellees. **ON BRIEF:** John R. Green, WARD & SMITH, P.A., New Bern, North Carolina, for Appellants. James K. Dorsett, III, Steven M. Sartorio, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

HAMILTON, Circuit Judge:

Pursuant to 42 U.S.C. § 1983, the plaintiff/appellee, Leonard Edmundson, administrator of the estate of James Richard Turnage, sued the defendants/appellants, Officers Grayham Keesler and Daniel Peters, alleging that Keesler and Peters deprived Turnage of his rights guaranteed by the Fourth and Fourteenth Amendments when Turnage was shot while attempting to flee. The plaintiff also alleged that the defendants/appellants, Chester Hill, Chief of Police of the Goldsboro Police Department, and James Morgan, former Chief of Police of the Goldsboro Police Department, were liable for the shooting of Turnage under a theory of supervisory liability, and that the defendant/ appellant, the City of Goldsboro, North Carolina, was independently liable for providing its officers inadequate training. See 42 U.S.C. § 1983.[1] The defendants appeal the district court's denial of their motion for summary judgment on the plaintiff's § 1983 claims. For reasons that follow, we vacate the district court's order denying the defendants' motion for summary judgment on the plaintiff's § 1983 claims and remand with instructions to enter judgment in favor of the defendants on these claims. Because all of the federal claims are without merit, we instruct the district court on

---

[1] In addition to the constitutional claims, several state law claims were raised by the estate and members of Turnage's family, none of which are before the court.

remand to dismiss without prejudice the remaining state-law claims.

I

The evidence submitted by the defendants in support of their motion for summary judgment revealed the following. According to Keesler and Peters, on July 2, 1992, they went to the Franklin Baking Company in Goldsboro, North Carolina, to arrest James Richard Turnage, a Franklin Baking Company employee, for felony possession with intent to distribute and distribution of marijuana. When the officers presented Turnage with the arrest warrant Turnage asked if he could finish unloading his delivery truck. The officers acquiesced.

While Turnage was unloading his truck, he ran from the bakery warehouse to his personal pickup truck, which was located in the gravel parking lot adjacent to the warehouse. A fence surrounded the parking lot, with one gate providing the only means of exiting the lot.

Seeing Turnage run for his truck, Keesler and Peters ran after him, calling for him to stop. Refusing to heed the officers' command, Turnage got into his truck, locked the doors, and started the engine. Turnage then backed up his truck in a semi-circular manner so that the front of his truck was facing the gate exiting the parking lot. When the truck stopped, Keesler was positioned in front of the truck, toward the passenger's side, and Peters was positioned near the driver's side door.

As Turnage accelerated quickly forward and slightly to the right, toward the exit, the truck struck Keesler but did not knock him down. At this point, Keesler stood with his chest and left hand on the hood and with his gun pointed at Turnage. To avoid being run over by the truck, Keesler continued to back up as the truck accelerated forward. When Keesler perceived that "Turnage was not going to stop, but that he was going to continue accelerating into [him]," (J.A. 182), Keesler fired one shot through the windshield. Believing that Keesler's life was in danger, Peters fired two shots through the driver's side window.

After the shots, the truck proceeded through the gate, into the street and stopped after it hit a pole. As a result of the injuries he received from the shots, Turnage died.

The defendants also submitted the affidavits of two witnesses to the shooting who confirmed the officers' account. One witness, E.T. Franklin Sr., observed Keesler in front of Turnage's truck and firing only after Turnage drove toward Keesler. Franklin also observed Peters on the driver's side of the truck and firing his shots after Keesler's. Another witness, Jimmy Stewart, observed Keesler in front of Turnage's truck with his left hand on the hood as Turnage drove forward toward Keesler. Stewart also averred that Keesler fired his weapon as the truck moved toward Keesler.

The defendants also submitted the affidavits of two experts who examined and evaluated the physical evidence. Their examination and evaluation of the

physical evidence also confirmed the officers' account. Tire impressions on the gravel parking lot revealed that the truck accelerated quickly backward and then accelerated forward. Ballistic report revealed that one bullet was fired from Keesler's weapon, and two from Peters' weapon. The physical evidence showed that the path of one bullet was from a position in front of and slightly to the left of the truck's front center. The physical evidence also showed that one bullet came from position slightly in front of the driver's side door and another from a position beside the driver's side door. Finally, Keesler's left palm print was found on the passenger side of the hood of the truck.

In response to the defendants' motion for summary judgment the plaintiff submitted affidavits from two of Turnage's supervisors, Lionel Ginn and William Tyson. According Ginn, as Turnage's truck moved backwards in a semi-circular direction, Keesler followed the truck, placing him in a position two to three feet from the front corner on the driver's side of the truck. As the truck moved forward and to the right toward the exit, Keesler fired his weapon at Turnage and then ran beside the truck shooting again twice into the driver's side. According to Tyson, as Turnage's truck moved forward and to the right toward the exit Keesler pushed off the truck and moved over to the driver's side of the truck out of the path of the truck." (J.A. 313). Keesler then fired into the truck through the driver's side window. According to Ginn and Tyson, Peters was neither behind the truck nor in their field of vision. As the truck left the lot, Ginn and Tyson saw Peters near the front gate of the parking lot.

The district court denied the defendants' motion for summary judgment based on qualified immunity, concluding that the affidavits of the plaintiff's two eyewitnesses created "a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional." (J.A. 324). The defendants appeal.[2]

II

We first address the defendants' contention that Keesler and Peters were entitled to qualified immunity. Under the doctrine of qualified immunity, government officials are immune from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Consequently, qualified immunity attaches when the government actor's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A qualified immunity defense is established if: (1) the government actor's action did not violate clearly established law, or (2) it was objectively reasonable for the government actor to believe that his action did not violate such law.

---

[2] Because this interlocutory appeal concerns the issue of whether, based on the facts viewed in light most favorable to the plaintiff, the officers' conduct violated clearly established law, we have jurisdiction. *See Behrens v. Pelletier*, 116 S. Ct. 834 (1996); *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

See *Anderson*, 483 U.S. at 641; *Harlow*, 457 U.S. at 818-19.

It is clearly established that under the Fourth Amendment individuals have the right to be free of excessive force and that there are constitutional limitations on the use of deadly force during the course of an arrest. *See Graham v. Connor*, 490 U.S. 386, 395-96 (1989). Thus, Keesler's and Peters' entitlement to qualified immunity turns on an assessment of the objective reasonableness of their belief that their conduct did not violate Turnage's right to be free of excessive force.

In determining whether the force used to effect a seizure was reasonable, and, therefore, not excessive, we apply an objective reasonableness test that examines "the facts and circumstances of each particular case," including, among other factors, "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting evade arrest by flight." *Id.* at 396.

The objective reasonableness test is met if "officers of reasonable competence could disagree" on the legality of the defendant's actions. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Supreme Court has made it clear that an officer's actions are not to be assessed with 20/20 hindsight. *Graham*, 490 U.S. at 396. Rather, "qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances." *Lennon v. Miller*, 66 F.3d 416, 424 (2d Cir. 1995).

Here, the facts in a light most favorable to the plaintiff demonstrate that Keesler, while positioned within two or three feet of a rapidly moving truck, fired all three shots, and Peter was at no time in the vicinity of the truck. Even in this light, the officers were entitled to qualified immunity because at the moment when Keesler used deadly force against Turnage, it was objectively reasonable for Keesler to view the use of deadly force as not excessive when considering the extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck. Indeed, in similar circumstances, we have upheld the use of deadly force.

For example, in *Drewitt v. Pratt*, after observing Drewitt driving recklessly, Officer Pratt ran toward the car with his gun drawn, ordering Drewitt to stop. 999 F.2d 774, 776 (4th Cir. 1993). Instead, Drewitt sped up, catching Pratt on the hood of the car. *Id.* At that point Pratt fired. *Id.* We affirmed the district court's holding that Pratt's actions were objectively reasonable and, therefore, Pratt was entitled to qualified immunity. *Id.* at 780.

We reached a similar result in *Pittman v. Nelms*, 87 F.3d 116 (4th Cir. 1996). There, the plaintiff was a passenger in a vehicle driven by Timothy Hudson. Officers Nelms and Banks approached the vehicle and confronted Hudson. As Hudson attempted to drive away, Banks's arm became entangled inside the window of the vehicle. Banks was dragged twenty-five to thirty feet before his arm finally came free, and he was thrown

aside. *Id.* at 118. Banks then rose and fired at the car. Nelms, who could see that Banks had not been run over and killed, also shot at the vehicle when it was approximately twenty-five feet away; the shot that Nelms fired struck Pittman. *Id.* at 120. We held that the force used by Officer Nelms was not excessive, and, therefore, Nelms properly was entitled to qualified immunity. *Id.*

This case is nearly indistinguishable from *Drewitt* and *Pittman*. Similar to *Drewitt* and *Pittman*, this case involved circumstances that were "tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397. In addition, as in *Drewitt* and *Pittman*, an officer, here Keesler, was in serious danger of injury--Keesler was within two to three feet of a rapidly moving truck. The law does not require that an officer be struck before he can discharge his weapon in an effort protect himself from harm. Indeed, similar perceptions of danger have served as a basis for qualified immunity even where those perceptions were mistaken. *See, e.g., Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (holding that officer's perception that suspect was reaching for gun reasonable when suspect was in fact holding only a bottle).

Under the circumstances confronted by Keesler, "an objectively reasonable officer certainly could have believed that his decision to fire was legally justified." *Pittman*, 87 F.3d at 120. Accordingly, Keesler was entitled to qualified immunity.

With regard to Peters, plaintiff's evidence places him at a distance from the events and suggests that he did not apply any force to Turnage. Because Keesler was

entitled to qualified immunity, Peters, as a non-shooter, was as well. *See Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir. 1996) ("In the absence of any underlying use of excessive force against Wilson, liability cannot be placed on either the non-shooting officers, a supervisor, or the City.").[2]

III

Our conclusion that the officers acted reasonably is dispositive of the § 1983 claims against Hill, Morgan, and the City of Goldsboro. In the absence of any constitutional violation by the officers, the claims against Hill, Morgan, and the City of Goldsboro fail. *See id.*; *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir. 1991) (holding that a claim of inadequate training cannot be established under § 1983 absent a finding of a constitutional violation by the person being supervised), *cert. denied*, 502 U.S. 1095 (1992); *see also Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) ("Because . . . there was no constitutional violation we need not reach the question of whether a municipal policy was responsible for the officers' actions . . . . Plaintiff's effort to turn this lawsuit into one for inadequate training of personnel . . . is unavailing where there has been no underlying constitutional infraction.").

---

[2] We note that with respect to Peters, we would reach the same result even if he discharged his weapon, which is the case under the defendants' version of the facts. Under *Drewitt* and *Pittman*, in light of the dynamic circumstances confronted by the officers, Peters could have reasonably believed that Keesler was in imminent danger.

IV

For reasons stated herein, we vacate the district court's order denying the defendants' motion for summary judgment on the plaintiff's § 1983 claims and remand with instructions to enter judgment in favor of the defendants on these claims. On remand, we instruct the district court to dismiss the state-law claims without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well."); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996) (directing dismissal without prejudice of state-law claims on remand after holding district court erred in failing to grant summary judgment to the defendant on the plaintiff's § 1983 claims on the basis of qualified immunity).

VACATED AND REMANDED WITH INSTRUCTIONS

HALL, Circuit Judge, dissenting:

"Interlocutory appeals . . . are the exception, not the rule." *Johnson v. Jones*, 115 S. Ct. 2151, 2154 (1995). I would dismiss this interlocutory appeal because I believe that the district court's order "determines only a question of 'evidentiary sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* at 2156.

With regard to situations involving fleeing suspects, the law was clearly established in 1992 that the use of deadly force is only justified if the officers have "probable cause to believe that [the suspect] pose[d] a significant threat of death or serious injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). I agree that the analysis of qualified immunity in excessive force cases requires a examination of the particular circumstances faced by the officers to determine whether it was objectively reasonable for the officers to act as they did. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). I disagree with the majority's conclusion that the order involved in this interlocutory appeal turned on whether the plaintiff's version of the facts made out a violation of clearly, established law. *See ante* at 6 n.2.

After a detailed examination of the evidence, the district court concluded that "the submission by plaintiffs of the affidavit of two eyewitnesses[1] is sufficient to creak

---

[1] Affidavit of Lionel Ginn: "Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr.

a genuine issue of material fact critical the legal determination of whether reasonable officers would have known that their actions were unconstitutional." *Edmundson v. Keesler*, No. 5:94-CV-467-B0(3) at 8-9 (E.D.N.C. Nov. 6, 1995) (order). In other words, the district court felt that the picture painted by Ginn and Tyson was that Keesler ran alongside the truck as it was pulling away from him, and that a permissible inference from this picture was that the shots were fired solely to stop the fleeing Turnage. Under what I think we all agree was the established law, this is a picture of excessive force.

The majority reduces the picture drawn by the plaintiff to "extremely dangerous circumstances confronted by the officers--a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck." *Ante* at 8. The district court, however, felt that much of what actually happened was open to dispute, particularly whether the truck was coming toward Keesler or moving away from him and toward the parking lot exit when the shots were fired. Whether Keesler was actually in danger, whether he appeared to be in danger, whether he could reasonably have thought

---

Turnage. . . . When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing."

Affidavit of William Scott Tyson: "Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit."

he was in danger, and whether he and his partner fired *solely* to stop the fleeing Turnage, are clearly material facts. Whether we believe the record support or even dictates a finding in the officers' favor on the immunity issue[2] is irrelevant to the inquiry under *Johnson v. Jones*; all that matters at this point is that the *district court* thought that these factual disputes were genuine.

I respectfully dissent.

---

[2] *Pittman v. Nelms*, 87 F.3d 116 (4th Cir. 1996), which is relied upon by the majority, *see ante* at 8, and which involved facts very similar to those in our case, was an appeal from a final order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 5:94-CV-467-B0(3)

LEONARD EDMUNDSON et al.,	)	
	)	
Plaintiffs,	)	
	)	ORDER
v.	)	
	)	
GRAYHAM KEESLER et al.,	)	
	)	
Defendants.	)	

This matter is before the undersigned on defendants' motion for partial summary judgment on the grounds of qualified immunity. The issue is whether defendant officers acted reasonably in using lethal force to serve an arrest warrant on a fleeing suspect. Finding a genuine issue of material fact necessary to the determination of the reasonableness of the officers' actions, the court denies defendants' motion for partial summary judgment.

On July 2, 1992, defendant officers Grayham Keesler and Daniel Peters traveled to the Franklin Baking Company in Goldsboro, North Carolina to serve an arrest warrant on Ricky Turnage, an employee of

Franklin. The warrant authorized the arrest of Turnage for selling 6.8 grams of marijuana five months earlier. When the defendant officers confronted Turnage, he asked if he could finish unloading his delivery truck. The officers acceded to his request. Some twenty to forty minutes later while the officers were conversing with Turnage's supervisors, Turnage ran out of the warehouse and into the parking lot in which his personal truck was parked. The officers followed. The parties' accounts of the events in the parking lot differ dramatically. In general terms, defendants argue that Turnage was in the process of running over Officer Keesler when the officers shot Turnage to death. Plaintiffs, on the other hand, allege that neither Keesler nor Peters was in danger of serious bodily harm. The evidence supporting each party's version is discussed below.

Defendants Keesler, Peters, Morgan, and Hill move for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that the doctrine of qualified immunity shields them from liability in this case. In order to grant a motion for summary judgment, the court must determine, in the light most favorable to the non-moving party, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Under Rule 56, a party may move with or without supporting affidavit. Fed. R. Civ. P. 56(a). When a motion is made and supported, the non-moving party must set forth specific facts showing there is a genuine issue for trial in order to avoid summary judgment for the moving party if otherwise appropriate. Fed. R. Civ. P.

56(e); see Celotex v. Catrett, 477 U.S. 317 (1986). In the instant case both parties have submitted affidavits in support of their arguments on the motion for partial summary judgment.

A court's analysis of the underlying facts on a motion for summary judgment on the grounds of qualified immunity should proceed no differently than in any other context. Buonocore v. Harris, 65 F.3d 347, 359 (4th Cir. 1995). If a plaintiff has alleged a clearly established right, summary judgment is improper as long as there remains any genuine issue of material fact regarding the actual conduct of the defendants. Id. at 359-60. A genuine issue of material fact exists if a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In deciding whether an official is entitled to qualified immunity, the court must (1) identify the specific constitutional right allegedly violated, (2) determine whether that right was clearly established at the time of the alleged violation, and (3) determine whether a reasonable person in the official's position would have known that his conduct would violate that right. Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). The first and second of these inquiries are pure questions of law for the court, but the third, which is also a question of law, may sometimes require factual determinations pertaining to the conduct of a defendant and the attendant circumstances. Id.

Plaintiffs have alleged that defendants deprived Turnage of his Fourth and Fourteenth Amendment rights to be free from unreasonable seizure. Specifically, plaintiffs aver that Officers Keesler and Peters used unconstitutionally excessive and lethal force in their attempt to arrest Turnage. Having identified the specific constitutional right allegedly violated, the court must ascertain whether the right was so clearly established as to put a reasonable defendant on notice that his conduct violated that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Collinson, 895 F.2d at 998. In Tennessee v. Garner, 471 U.S. 1 (1985), the United States Supreme Court held that the use of deadly force to prevent the escape of an apparently unarmed suspected felon is unconstitutional unless such force "is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3; see Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991). Additionally, it is undisputed that Keesler and Peters were aware of this limitation on the use of deadly force from the training they had received as officers. Hill Aff. ¶ 8; Morgan Aff. ¶¶ 3, 4, 8. Thus, the court concludes that reasonable officers would be aware of the general right allegedly violated.

The final determination required of the court is whether a reasonable officer would have known that his conduct violated Turnage's rights. A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information could have believed that his conduct was lawful. Anderson, 483 U.S. at 641. In evaluating the factual context, the

reasonableness standard requires a court to focus on the circumstances as they appeared to exist at the time the events were unfolding, affording interpretive latitude to official judgments. Gooden v. Howard County, 954 F.2d 960, 965 (4th Cir. 1992); Torchinsky v. Siwinski, 942 F.2d 257, 261 (4th Cir. 1991).

Accordingly, if a reasonable officer in the position of Keesler could have found probable cause to believe that Turnage posed a serious threat of personal bodily harm at the time Keesler shot Turnage, then as a matter of law, Keesler is entitled to qualified immunity. Similarly, if a reasonable officer in the position of Peters could have found probable cause to believe that Turnage posed a serious threat of bodily harm to Keesler at the time Peters shot Turnage, then eters is entitled to qualified immunity as a matter of law. Both inquiries, however, require the court to analyze the facts surrounding the relative positions and movements of Turnage, Peters, and Keesler.

According to the affidavits given by Officers Keesler and Peters, they chased Turnage as he fled from the bakery warehouse demanding that he stop. Keesler Aff. ¶ 27; Peters Aff. ¶ 12. Ignoring the officers' demands, Turnage jumped into his truck, started the engine, and backed the truck in a clockwise direction, nearly hitting Peters who stood behind the truck with his pistol drawn. Keesler Aff. ¶¶ 31, 32; Peters Aff. ¶ 13. By the time the truck stopped, Peters had moved to a position near the driver's side door. Keesler Aff. ¶ 33; Peters Aff. ¶ 13. Meanwhile, Keesler stood in front of

the truck on the passenger's side. Keesler Aff. ¶ 33; Peters Aff. ¶ 14.

At this point defendants contend that Turnage raced the engine, turned the steering wheel to the right, and accelerated in disregard of warnings being yelled by the officers. Keesler Aff. ¶ 34; Peters Aff. ¶ 14. Turnage's truck then struck Keesler. Keesler Aff. ¶ 35. Standing with his left hand and chest against the hood, Keesler pointed his gun at Turnage. Keesler Aff. ¶ 35; Peters Aff. ¶ 15. While trying to retreat, Keesler fired one shot through the windshield at Turnage. Keesler Aff. ¶ 36. Officer Peters then fired two shots through the driver's side window at Turnage. Peters Aff. ¶ 15. After the shots, the truck proceeded into the street, halting after it hit a guy wire of a utility pole. Keesler Aff. ¶ 41; Peters Aff. ¶ 17, 19. Turnage was dead by the time the officers reached the truck. Keesler Aff. ¶ 44; Peters Aff. ¶ 20.

Observations by two witnesses support the account of the officers. The proprietor of the bakery and a delivery person observed Keesler standing in front of Turnage's truck with his left hand on the hood as Turnage drove forward. Stewart Aff. ¶ 4; Franklin Aff. ¶ 4. The witnesses saw Keesler fire his weapon only after Turnage drove in Keesler's direction. Stewart Aff. ¶ 4; Franklin Aff. ¶ 4. The proprietor also witnessed a police officer standing on the driver's side of the truck as it moved forward. Franklin Aff. ¶ 5.

In addition to the eyewitness accounts, affidavits by two experts based upon the physical evidence collected at the scene corroborate the stories of the officers. The ballistics reports and the autopsy reveal that Keesler fired his gun once while positioned in front of the truck to the passenger's side of the center of the truck. Ross Aff. ¶ 18; Matthews Aff. ¶ 10, 16. The bullet passed through the windshield, through Turnage's chin, and into Turnage's chest. Ross Aff. ¶ 18; Matthews Aff. ¶¶ 10, 16. Keesler's palm prints were found on the hood of Turnage's truck in a position consistent with where Keesler would have had to have stood in order to have fired the bullet which traveled through the windshield. Ross Aff. ¶ 19; Matthews Aff. ¶ 15. The ballistics reports also show that Peters fired one shot from a position just slightly in front of the driver's side door and a second shot from beside the driver's side door. Ross Aff. ¶ 20; see Matthews Aff. ¶¶ 11, 12, 16. One bullet struck Turnage's chest, lodging in his heart, and the other traveled through his arm. Ross Aff. ¶ 20; Matthews Aff. ¶¶ 11, 12. Additionally, tire impressions in the gravel parking lot indicate that the truck accelerated rapidly. Id. ¶ 21.

Plaintiffs rebut defendants' account of the incident with affidavits from Turnage's supervisors who also witnessed the incident. According to Lionel Ginn and William Scott Tyson, after Turnage jumped in his truck he drove a short distance forward up an embankment where Keesler stood with his gun drawn. Ginn Aff. ¶ 8. Keesler pounded on the truck's hood yelling at Turnage to stop. Ginn Aff. ¶ 8. Turnage then stopped and backed out of his parking space in a semicircular manner

positioning his truck so that it pointed in the direction of the parking lot gate leading to the public street. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Keesler followed the truck placing himself two to four feet from the front corner on the driver's side. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Turnage then began to drive forward and to the right, away from Officer Keesler. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Keesler fired his gun toward Turnage and then ran beside the truck shooting again into the driver's side window. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. The affiants did not see the position of Officer Peters, but swear that he was neither behind the truck nor in danger of being hit by the truck. Ginn Aff. ¶ 9; Tyson Aff. ¶ 10.

The affidavits submitted by the parties reveal two very different versions of the events eading to the death of Turnage. Defendants' account of the incident provides a factual basis upon which the court could conclude as a matter of law that the officers acted in accordance with constitutional standards in their use of lethal force. Because the doctrine of qualified immunity requires only that the officers act reasonably in response to the information they possess regarding the surrounding circumstances, Anderson, 483 U.S. at 641; Slattery, 939 F.2d at 216, defendants' evidence that Officer Keesler was in danger of being run over by Turnage would provide a basis for a finding of qualified immunity. Defendants' account of the events is not, however, undisputed. The affidavits of two eye-witnesses, submitted by plaintiffs, directly contravene defendants' version of the events. Specifically, plaintiffs' witnesses, who observed the entire incident, swear that Keesler stood to the driver's side of the truck as Turnage

accelerated forward and to the passenger's side. Such evidence would permit this court to hold that reasonable officers would have known that the use of lethal force was unconstitutional, thereby depriving defendant officers of the defense of qualified immunity.

The court finds that the submission by plaintiffs of the affidavits of two eye-witnesses is sufficient to create a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional. It is of no consequence that defendants have submitted what they believe to be conclusive physical and forensic evidence in support of their version of the facts. The existence of such evidence des not automatically render contradictory eye-witness testimony worthless. Instead, the value of that evidence, as well as of that submitted by plaintiffs, turns on an assessment of credibility that only a jury can make. The court therefore holds that a reasonable jury could find the facts as alleged by plaintiffs, thereby necessitating a trial as to the facts underlying the officers' use of lethal force.

Accordingly, defendants' motion for partial summary judgment on the grounds of qualified immunity is DENIED.

This 2nd day of November, 1995.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED January 2, 1997

No. 95-3125
CA-94-467-5-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above

Plaintiffs - Appellees

v.

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department

Defendants - Appellants

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO

Defendants

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above

Plaintiffs - Appellees

v.

CITY OF GOLDSBORO

Defendant - Appellant

and

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department; THE CITY OF GOLDSBORO POLICE DEPARTMENT

Defendants

On Petition for Rehearing with
Suggestion for Rehearing *In Banc*

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

FILED: March 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3125(L)
(CA-94-467-5-BO(3))

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELYERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs - Appellees,

versus

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants - Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,
Defendants.

ORDER

Appellees have filed a motion to dismiss these consolidated appeals, appellants filed a response in opposition to the motion and appellees filed a reply in support of the motion. Appellants have filed a motion for emergency stay of district court proceedings pending appeal, appellees filed a response in opposition to the motion and appellants filed a reply in support of the motion.

The Court denies appellees' motion to dismiss appeals and grants appellants' motion for stay of district court proceedings pending appeal.

Entered at the direction of Judge Luttig with the concurrence of Judge Hall and Judge Williams.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX E

FILED: March 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3125(L)
(CA-94-467-5-BO(3))

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELYERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, as Guardian ad Litem for the above,

Plaintiffs - Appellees,

versus

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants - Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,
Defendants.

ORDER

The last paragraph of the order of this Court filed on March 28, 1996 is corrected as follows:

Entered at the direction of Judge Luttig with the concurrence of Judge Williams. Judge Hall voted to dismiss.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 5:94-CV-467-B0(3)

LEONARD EDMNDSON et al.,	)	
	)	
Plaintiffs,	)	
	)	ORDER
v.	)	
	)	
GRAYHAM KEESLER et al.,	)	
	)	
Defendants.	)	

This matter is before the undersigned on defendants' motion to dismiss most of plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In addition, plaintiffs "concede dismissal" of several of their claims. Each claim is discussed separately below.

This case arises out of the shooting death of Ricky Turnage by Goldsboro police officers. On July 2, 1992, Officers Keesler and Peters attempted to serve an arrest warrant on Turnage at his place of employment. After speaking with Turnage, the officers agreed to

permit Turnage to finish unloading his delivery truck before taking him into custody. In the interim while the officers were conversing with Turnage's supervisor, Turnage darted out of the warehouse toward his pickup truck. The officers pursued Turnage who started his engine and began to drive away. Allegedly fearful that Turnage was going to run over at least one of them, the officers fired shots, killing Turnage immediately. As a result the decedent's estate and his family bring claims under 42 U.S.C. § 1983 and North Carolina law. Defendants now move to dismiss plaintiffs' claims.[1]

Before addressing defendants' motion to dismiss, the court notes that in their brief plaintiffs "concede dismissal" of the following claims: (1) claims against the Goldsboro Police Department; (2) claims against Grayham Keesler, Daniel Peters, James Morgan, and Chester Hill in their official capacities; (3) claims for punitive damages against the City of Goldsboro; and (4) the estate's claims against Keesler, Peters, Morgan, and Hill in their individual capacities for violations of Turnage's Fifth, Eighth, and Fourteenth amendment rights. Construing plaintiffs' "concessions" as a motion for voluntarily dismissal pursuant to Rule 41(a), the court DISMISSES these claims WITH PREJUDICE.

---

[1] The only claims not the object of this motion are the estate's wrongful death claim and the estate's § 1983 claim based on violation of the decedent's Fourth Amendment rights. In an earlier ruling, Edmundson v. Keesler, 904 F. Supp. 478 (E.D.N.C. 1995), this court denied defendants' motion for summary judgment on the latter claim.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil procedure a court should not dismiss an action for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994), cert. denied, 115 S. Ct. 1956 (1995). When reviewing the claims, a court must accept the factual allegations of the complaint as true. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515-16 (1972); Randall, 30 F.3d at 522. Furthermore, the court must construe those factual allegations in the light most favorable to the plaintiff. Randall, 30 F.3d at 522.

First and Fourteenth Amendment Claims

Plaintiff family members allege that defendants violated their "substantive due process rights not to be deprived of the society, companionship, life, love, comfort, association and support of [decedent] in violation of the Fifth and Fourteenth Amendments" to the United States Constitution. Compl. ¶ 73. In addition, these plaintiffs aver that defendants deprived them of their right to "continued familial associations [with decedent] guaranteed by the First and Fourteenth Amendments." Id. ¶ 73.

As plaintiffs indicate in their brief, courts in circuits other than the fourth have recognized a separate constitutional liberty interest of "intimate association." See Rucker v. Harford County, 946 F.2d 278, 282 (4th Cir. 1991), cert. denied, 112 S. Ct. 1175 (1992). Some

courts have located the right in the First Amendment's guarantee of free association, see Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189-90 (10th Cir. 1985), while others have relied on the substantive component of the Due Process Clause of the Fourteenth Amendment, see Kelson v. City of Springfield, 767 F.2d 651, 654 (9th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205, 1245 (7th Cir. 1984).

Nevertheless, the Fourth Circuit has explicitly refused to recognize this right. Shaw v. Stroud, 13 F.3d 791, 804-05 (4th Cir.), cert. denied, 115 S. Ct. 67, 68 (1994). In Shaw the decedent was shot and killed by a police officer during an attempted arrest. Id. at 794. The wife, who witnessed the event, and the decedent's minor children brought several claims against the officer and his supervisor including a claim "for the loss of the love and support of a family member." Id. at 804. Finding that the Supreme Court has never extended the constitutionally protected liberty interest incorporated by the Fourteenth Amendment Due Process Clause to encompass deprivations resulting from governmental actions affecting family members only incidentally, the court affirmed summary judgment against the decedent's family. Id. at 805. Thus, Shaw precludes plaintiffs from stating a claim under the Fourteenth Amendment.

Although Shaw concerned only a Fourteenth Amendment claim, its reasoning appears equally applicable to plaintiffs' First Amendment claim. First, the interest underlying each claim, loss of an intimate familial relationship, is identical. Second, the Supreme Court has never extended the First Amendment's guarantee of free

association to protect such a right. Finally, in an earlier case, the Fourth Circuit recognized that both the First Amendment and the Fourteenth Amendment provide theoretical alternatives for protecting these identical interests. Rucker, 946 F.2d at 282. Accordingly, the claims of plaintiff family members for violations of their First and Fourteenth Amendment rights are DISMISSED WITH PREJUDICE.

Negligent Infliction of Emotional Distress

Plaintiffs Robert and Alene Yelverton, parents of the deceased, assert a claim for infliction of emotional distress against the defendant officers. These plaintiffs allege that they suffered severe emotional distress as a result of "learn[ing] that their son had been brutally shot and that his body had been mutilated." Compl. ¶ 91. Although plaintiffs fail to denominate this claim as one for negligent, rather than intentional, infliction of emotional distress, plaintiffs' brief clarifies that the claim asserted is of the negligent variety.[2]

---

[2] In an effort to be thorough, defendants address both varieties of infliction of emotional distress in their motion and briefs. An ambiguity does arise because plaintiffs assert in the complaint and argue in their brief that defendants' actions were intentional rather than negligent. Plaintiffs' argument is based, however, solely on the law of negligent infliction of emotional distress. Furthermore, even a liberal construction of the complaint fails to reveal a claim for intentional infliction. Under North Carolina law, intentional infliction of emotional distress requires extreme and outrageous conduct which is intended to cause and does cause severe emotional distress to another. Dickens v. Puryear, 302 N.C. 437, 452 (1981). Plaintiffs' complaint does not allege the required intent.

To establish a claim for negligent infliction of emotional distress under North Carolina law, plaintiffs must allege that: (1) defendants negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause plaintiffs severe emotional distress; and (3) the conduct did in fact cause plaintiffs severe emotional distress. Hickman v. McKoin, 337 N.C. 460, 462 (1994). When viewed in the light most favorable to plaintiffs, the complaint facially satisfies the first and third elements of the claim. Although plaintiffs' complaint appears to allege intentional conduct by the officers with respect to the death of plaintiffs' son, the court finds that the complaint can be liberally construed to allege negligent conduct in the alternative.

The remaining issue is whether plaintiffs have sufficiently alleged the element of foreseeability. When plaintiffs attempt to recover for their own emotional distress arising from concern for another person, the determination of foreseeability requires an analysis of all facts alleged including: (1) plaintiffs' proximity to the negligent act causing injury to the other person; (2) the relationship between plaintiffs and the other person; and (3) whether plaintiffs personally observed the negligent act. Id. (quoting Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 334 N.C. 669, 672-73 (1993)).

In this regard, a review of plaintiffs' complaint reveals only a conclusory statement that "[i]t was reasonably foreseeable by defendants . . . or it should

have been foreseeable that their acts and omissions would cause such injury and severe emotional distress to plaintiffs." Compl. ¶ 92. Plaintiffs fail to allege that they were in close proximity to the incident or that they witnessed either the shooting itself or its immediate aftermath. In fact, they do not allege seeing decedent's corpse until the viewing at the funeral. Apparently, plaintiffs rely simply on their parent-child relationship with the decedent and their subsequent knowledge of the details of the shooting. However, "the parent-child relationship, standing alone, is insufficient to establish reasonable foreseeability." Hickman, 337 N.C. at 464.

In Hickman the minor children of a woman involved in a car accident brought an action against the responsible negligent driver. Id. at 461. Plaintiffs, who were at home at the time of the accident, alleged that they suffered severe distress after they were told later that day that their mother was not likely to survive her injuries. Id. Plaintiffs also visited their mother in the intensive care unit and witnessed her pain and suffering as she endured a series of life-threatening operations over the next several years. Id. Finding these facts insufficient to establish plaintiffs' allegation of foreseeability, the North Carolina Supreme Court dismissed the action. Id. at 464; see also Gardner v. Gardner, 334 N.C. 662 (1993) (affirming summary judgment against plaintiff mother who witnessed unsuccessful resuscitative efforts on her son in emergency room because she neither witnessed nor was in close proximity to accident); Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 334 N.C. 669 (1993) (affirming dismissal of complaint alleging that plaintiff

parents had learned after the accident that their son had been killed and his body mutilated).

In light of the complaint's omission of any factual allegations related to foreseeability other than the parents' relationship to the decedent and their acquisition of knowledge subsequent to the accident, the court finds that the complaint fails to state a claim for negligent infliction of emotional distress. Accordingly, plaintiffs' claim for negligent infliction of emotional distress is DISMISSED.

Desecration or Mutilation

Plaintiff family members also assert a claim of desecration of body against the City of Goldsboro. The complaint alleges that agents of defendant entered the funeral home and fingerprinted decedent's corpse without permission from any family member after it had been released to the family. Compl. ¶ 52. As a result plaintiffs aver that they suffered severe emotional distress. Compl. ¶¶ 111 53, 95.

Under North Carolina law the person entitled to possession of a body may recover damages for mental suffering caused by negligent or intentional mishandling or mutilation of the body. Dumouchelle v. Duke University, 69 N.C. App. 471, 474 (1984). Although North Carolina courts (or any other court in a published opinion) have not addressed whether fingerprinting of a corpse after it has been released to family members amounts to mutilation, the North Carolina Supreme Court has stated that "the next of kin has a quasi-

property right in the body--not property in the commercial sense but a right of possession for the purpose of burial--and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently." Parker v. Quinn-McGowen Co., 262 N.C. 560, 561 (1964).

Neither the pleadings nor the briefs discuss the circumstances attendant to the alleged fingerprinting with any specificity. Whether the alleged fingerprinting resulted in any disfigurement of the corpse, cf. Parker, 262 N.C. at 562-63 (holding that unauthorized embalming does not constitute mutilation because, inter alia, it does not involve disfigurement or dismemberment), and the timing of the fingerprinting vis-a-vis the viewing are two facts critical to the determination of whether plaintiffs have stated a claim. Certainly, the extent of any disfigurement, such as the existence of more than de minimis ink markings on the decedent's hands and fingers, and the proximity of the act or the family's acquisition of knowledge of the act to the viewing are pertinent to whether defendant interfered with plaintiffs' quasi-property right in burying the body with appropriate dignity. Given these omissions in the pleadings, this court cannot hold as a matter of law at this stage in the proceedings that plaintiffs can prove no set of facts that would entitle them to relief.

Defendant's contention that § 15A-502 of the North Carolina General Statutes required the fingerprinting is not, by itself, sufficient to bar plaintiffs' action. In pertinent part that statute provides that "[i]t

shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of a felony to be fingerprinted and to forward those to the State Bureau of Investigation." N.C. Gen. Stat. § 15A-502(a). Defendant has failed to demonstrate that an arrest was actually effectuated. Additionally, even if defendant had the right, or duty, to fingerprint the corpse while it was in defendant's custody, that right terminated upon delivery of the corpse to plaintiffs. After delivery defendant could have sought consent from family members or obtained a court order.

Defendant also argues that if a claim for desecration or mutilation exists, only plaintiff's daughter has standing to assert that claim. "As a general rule, only the person entitled to possession and disposition of a body may maintain an action for mishandling or mutilation of the body." Dumouchelle v. Duke University, 69 N.C. App. 471, 474 (1984) (emphasis added). Thus, when no surviving spouse exists, the cause of action vests in the next of kin, including minor children. Morrow v. Southern Ry., 213 N.C. 127, 128 (1938). "[N]ext of kin means nearest of kin--the nearest blood relations of the person designated." In re Will of Cobb, 271 N.C. 307, 309 (1967). In the case at bar, the parents and the daughter of the decedent have standing because they are each one degree of kinship from decedent. See N.C. Gen. Stat. § 104A-1 (computation of degrees of kinship).

Accordingly, defendant City of Goldsboro's motion to dismiss plaintiffs' claim for desecration or mutilation is DENIED with respect to plaintiffs Alene

Rouse Yelverton, Robert Yelverton, and Erin Jannell Shirley, but is GRANTED with respect to all other plaintiffs.

Conclusion

As specified above, defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. Consequently, the following claims remain viable: (1) the estate's claim for wrongful death against the City of Goldsboro and Keesler, Peters, Morgan, and Hill in their individual capacities; (2) the estate's § 1983 claim based on Fourth Amendment violations against the City of Goldsboro and Keesler, Peters, Morgan, and Hill in their individual capacities; and (3) Alene Rouse Yelverton, Robert Yelverton, and Erin Jannell Shirley's claim for desecration or mutilation against the City of Goldsboro. All other claims are DISMISSED pursuant to Rules 12(b)(6) and 41(a).

This 9th day of January, 1996.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,	)	
Plaintiffs,	)	
v.	)	AFFIDAVIT OF LIONEL GINN
GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department	)	

and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

The undersigned, being first duly sworn, deposes and says that:

1. My name is Lionel Ginn, and I live at 3979 Central Heights Road, Goldsboro, North Carolina. I am a supervisor at the Franklin Baking Company in Goldsboro, North Carolina.

2. In submitting this affidavit to the Court, it is my intention to be a completely impartial and unbiased witness and not to side with either party in this litigation. I have been interviewed by counsel for plaintiffs and I have

been interviewed by representatives from the North Carolina State Bureau of Investigation and the defendants' attorneys, and I have provided to each the same accounting of what I observed at the time of the death of James Richard ("Ricky") Turnage.

3. On July 2, 1992, I was employed as a supervisor by Franklin Baking Company at their warehouse in Goldsboro, North Carolina. I was called by Carl Wadsworth, a fellow employee, to his office. Mr. Wadsworth handed me a piece of paper with Officer Keesler's name and telephone number on it with instructions to call Officer Keesler when Mr. Turnage returned to the warehouse from making his deliveries. Mr. Wadsworth told me not to tell Mr. Turnage anything about the call. Sometime later, Mr. Turnage's direct supervisor, Scott Tyson, came in and I gave the information to him.

4. At approximately 1:15 p.m. on the same date, Mr. Turnage backed his Franklin Baking Company delivery truck into the warehouse, at which time Mr. Tyson placed a call to Officer Keesler. About five minutes later, two police officers, Officer Keesler and Officer Peters, came into the warehouse, approached Mr. Tyson and me and asked if we were "boss men." I told them we were, and the officers then asked where Mr. Turnage was. Mr. Tyson said, "Right there," and pointed toward Mr. Turnage, who was standing at the back of his delivery truck. I then followed the officers and Mr. Tyson over to where Mr. Turnage was standing. I heard Officer Keesler tell Mr. Turnage that he had a warrant for his arrest for selling marijuana. Mr. Turnage replied by saying, "You've got the wrong man," and the officer replied, "No, we don't." Mr.

Turnage asked the officers if he could finish unloading his delivery truck, and they replied that they had "all day" and that it would be "fine" for Ricky to unload his truck. Mr. Turnage then started unloading his truck. At first the officers stood near the truck and watched him.

5. After a while, one of the officers, Officer Keesler, came to the desk area and started a conversation with Mr. Tyson and me. A little while later, the other officer, Officer Peters, joined us. Every once in a while, Mr. Turnage would walk to the front of his truck, and Officer Peters would go over to see what he was doing. Mr. Tyson told the officers at least two (2) times that if they wanted to go ahead and take Mr. Turnage downtown, someone else would finish unloading the truck. One of the officers replied that it would "probably be his [Mr. Turnage's] last day at work, so we'll let him finish."

6. After a while, both officers stopped paying much attention to what Mr. Turnage was doing. Instead, the officers were in the desk area, about 30-35 feet away from Mr. Turnage's truck, engaged in general conversation with Mr. Tyson and me. A while later, I was leaning back in my chair talking to the officers, and I heard Officer Peters say, "There he goes." I saw Ricky Turnage run out of the door on the west side of the warehouse leading towards the gravel parking lot on which his personal pickup truck was parked with its front facing the warehouse. Officer Peters turned and ran out of the bay doors on the south side of the building. Officer Keesler also ran out of the warehouse, using the same door that Mr. Turnage had run out of. By the time he reached the door, Officer Keesler already had his gun in his hand, and he ran out of the door with his gun

drawn. Both Scott and I followed Officer Keesler out of the door towards the area where Ricky's pickup truck was parked.

7. By the time I got out the door and onto the walkway that leads down the hill to the parking area, I saw that Mr. Turnage had already gotten into his truck. Mr. Turnage's truck was parked to my right with its front facing the warehouse as I stood on the walkway, approximately 65 feet away. I could see that Mr. Turnage had locked the doors and was starting his engine. Scott Tyson was standing next to me. I saw Officer Keesler at the passenger side of the pickup truck trying to open the truck's door. Officer Keesler was also yelling for Mr. Turnage to stop his truck. Keesler still had his gun in his hand.

8. Because of where he had parked his pickup truck and because the parking lot is fenced in, the only way for Mr. Turnage to leave the lot was to drive toward the parking lot gate leading to Carolina Street. Once Mr. Turnage got his vehicle started, he drove his truck forward a short distance up the embankment. By this time, Officer Keesler had moved to the front of Ricky's truck, within two to three feet of it. Officer Keesler stood in front of the truck with his gun in his hand pointed at the windshield yelling, "Stop, stop, stop." He hit the hood of the truck several times with his other hand. Ricky then stopped his truck and backed up in a semi-circular manner so that the front of his truck was then facing the gate exiting the parking lot. Officer Keesler followed Ricky's truck as Ricky drove his truck backwards and came to a position near the front corner of the truck, on the driver's side, again two to three feet from the truck. Mr. Turnage then began to drive his

truck forward and rightward towards the gate leaving the parking lot. The motion of the pickup truck and Officer Keesler's movements put Officer Keesler to the right side/driver's side of the truck. At this point in time, Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage. I saw Mr. Turnage in his truck as he went by. It looked like Mr. Turnage had been hit by a bullet because of the way he was slumped over. Mr. Turnage's truck kept moving forward, and he drove his truck out of the parking lot through the gate and drove up Carolina Street. His pickup truck struck a guy wire on the right side of Carolina Street and came to a stop.

9. During this time, while I do not know precisely where Officer Peters was or if he fired his weapon, he was never in my field of vision as I witnessed these events and saw Ricky being shot. Officer Peters was not behind Ricky's truck. I saw Ricky's truck leave the parking lot. As it left the lot, I saw Officer Peters near the front gate of the parking lot leading onto Carolina Street.

10. I saw Mr. Franklin outside the gate. Mr. Franklin asked me, "What the hell is going on." I told Mr. Franklin that the police had just shot Ricky Turnage.

11. After the incident, I went back and looked at the parking lot. There was a lot of glass from Mr. Turnage's truck in the area where Mr. Turnage had stopped after backing his truck up.

Further this affiant sayeth not.

This the 10th day of January, 1995.

/s/ Lionel Ginn
Lionel Ginn

Sworn to and subscribed before me, this the 10th day of January, 1995.

/s/ Tricia A. Millward
(SEAL) Notary Public

My Commission Expires:

4/29/95

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON, KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,	)	
Plaintiffs,	)	
v.	)	AFFIDAVIT OF WILLIAM SCOTT TYSON
GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina,	)	

DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

The undersigned, being first duly sworn, deposes and says that:

1. My name is William Scott Tyson, and I live at 489 Potts Road, Dudley, North Carolina. I am employed as a supervisor at Franklin Baking Company in Goldsboro.

2. In submitting this affidavit to the Court, it is my intention to be a completely impartial and unbiased witness and not to side with either party in this litigation. I have been interviewed by counsel for plaintiffs and I have been interviewed by representatives from the Goldsboro Police Department, and I have provided to each the same accounting of what I observed at the time of the death of James Richard ("Ricky") Turnage.

3. I was Ricky Turnage's immediate supervisor for over three (3) years. Mr. Turnage was a good employee and had never missed a day's work while I was his supervisor.

4. On July 2, 1992 at approximately 11:00 a.m., I returned to the Franklin Baking Company warehouse from Mt. Olive, where I had been on business. Lionel Ginn, another supervisor, approached me and told me that he had gotten a message that someone should call Officer Graham Keesler of the Goldsboro Police Department when Ricky Turnage returned to the warehouse from making his deliveries. Lionel went on to say that Mr. Turnage was not to be notified about what was going on.

5. When I saw Mr. Turnage drive his delivery truck into the Franklin Baking Company lot, I called Officer Keesler to advise him that Mr. Turnage had arrived back at the warehouse. About five minutes later, Officers Keesler and Peters arrived at the warehouse and entered the building

where Lionel Ginn and I were standing. The officers asked where the "boss" man was, and I explained to them that both Lionel and I were supervisors. They then asked where Ricky Turnage was, and I then walked with the officers to where Mr. Turnage was working. Mr. Turnage had backed his delivery truck into the warehouse and he was unloading the truck. Mr. Turnage was then told by the officers that they had a warrant for his arrest for the possession and sale of marijuana. Mr. Turnage replied, "Not me," and the officers said, "Yes, you." Mr. Turnage then asked if he could unload his truck before he was taken from the warehouse, and the officers said he could. Lionel Ginn and I then sat down at the desk located outside the office area in the warehouse, approximately 30-35 feet from where Mr. Turnage's delivery truck was located. We sat there, waited and watched.

6. At first, the officers stayed with Mr. Turnage while he unloaded his truck, one on each side of the truck. After about 15 minutes, Officer Keesler came to the desk where Mr. Ginn and I were sitting and started a conversation. I asked Officer Keesler why Mr. Turnage was being arrested, and he told me that Ricky had sold some marijuana to an undercover agent. After 35-40 minutes had passed, Officer Peters also came over to the desk area and sat down and joined in the conversation I was having with Mr. Ginn and Officer Keesler. A short time later, one of the officers yelled, "There he goes." I never saw Mr. Turnage leave the warehouse, but I saw the door on the west side of the building closing behind him. Officer Keesler then ran out of the same door behind Mr. Turnage. Officer Peters ran out of the bay door on the south side of the building in a direction toward the gate to the warehouse

parking area leading to Carolina Street. Mr. Ginn and I ran out the door on the west side of the warehouse behind Officer Keesler.

7. As I went out of the door onto the sidewalk, I could see that Mr. Turnage was already in his pickup truck and Officer Keesler was on the passenger side of the truck. Officer Keesler held his pistol out in his right hand, and with his left hand he was trying to open the passenger door. Officer Keesler was telling Mr. Turnage to stop. Mr. Turnage started his truck, put it in reverse, and backed his truck up in a rightward, semi-circular manner. Mr. Turnage stopped with the front of his pickup truck facing the gate leading from the warehouse parking lot onto Carolina Street. At this time Officer Keesler ran at an angle to the front driver's side of Mr. Turnage's truck and yelled for Mr. Turnage to stop. Officer Keesler was less than three feet in front of Mr. Turnage's truck. Officer Keesler still held his pistol in his right hand. As Mr. Turnage then drove forward and rightward toward the parking lot exit, Officer Keesler pushed off the truck and moved over to the driver's side of the truck out of the path of the truck. Ricky was still driving his truck forward and to his right, away from where Officer Keesler was positioned. Officer Keesler then shot into the vehicle through the driver's side window.

8. Mr. Turnage did not drive his pickup truck toward Officer Keesler after Officer Keesler stepped to the driver's side of the truck. Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit. If Officer Keesler's life was ever placed in danger, it was when he ran

in front of the moving vehicle, before he fired his gun through the driver's side window after he moved out of the way of the truck.

9. After the shooting, Mr. Turnage's vehicle went out of the gate, past Officer Peters and onto Carolina Street. Officer Keesler followed the truck out of the parking lot on foot.

10. I am not sure exactly where Officer Peters was when Officer Keesler shot Ricky Turnage, but I remember that he was somewhere close to the area of the parking lot where the gravel pavement meets the asphalt near the parking lot gate. I did not see Officer Peters behind Ricky's pickup truck and he was not in danger of being hit by the truck when Officer Keesler fired.

11. Following the incident, I walked across Carolina Street where I saw Mr. Franklin, Sr., who wanted to know what was going on. I told Mr. Franklin about what had happened. Mr. Franklin and I then rode to the intersection where Mr. Turnage's truck had struck the guy wire.

12. After the accident, I had a chance to examine the Franklin Bakery parking lot. I saw mirrored glass on the parking lot in the area where Mr. Turnage stopped his truck after he had backed up and before he started forward.

Further this affiant sayeth not.

This the 10th day of January, 1995.

/s/ William Scott Tyson
William Scott Tyson

Sworn to and subscribed before me, this the 10th day of January, 1995.

/s/ Tricia A. Millward
(SEAL) Notary Public

My Commission Expires:

4/29/95

N:\4658.1\petition.tst

Supreme Court, U.S.
FILED
MAY 8 1997
OFFICE OF THE CLERK

No. 96-1585

In The

Supreme Court of the United States

October Term, 1996

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage; ARLENE ROUSE YELVERTON; ROBERT YELVERTON; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks,

Petitioners,

v.

GRAYHAM KEESLER; DANIEL PETERS; JAMES P. MORGAN; CHESTER HILL; and CITY OF GOLDSBORO, NORTH CAROLINA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH R. WOOTEN
Counsel of Record for Respondents
WARD AND SMITH, P.A.
1001 College Court
Post Office Box 867
New Bern, North Carolina 28563-0867
(919) 633-1000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES BELOW

Respondents object to the list of parties presented in Petitioners' Brief to the extent that the City of Goldsboro Police Department is named as a defendant. The United States District Court for the Eastern District of North Carolina dismissed with prejudice all claims against the Goldsboro Police Department by Order dated January 9, 1996, during the pendency of Respondents' appeal to the Fourth Circuit Court of Appeals, and no appeal was taken.

TABLE OF CONTENTS

Page

PARTIES BELOW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF CASE 1

A. Statement of Facts 1

B. Proceedings Below 4

REASONS FOR DENYING THE WRIT 5

I. THE FOURTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH ANY DECISIONS OF OTHER CIRCUIT COURTS 5

II. THE DECISION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH *JOHNSON v. JONES* 9

III. THE DECISION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH *TENNESSEE v. GARNER* 14

IV. THE FOURTH CIRCUIT'S OPINION IS NOT ERRONEOUS AND PRESENTS NO QUESTIONS WORTHY OF REVIEW BY THIS COURT 15

CONCLUSION 17

APPENDIX

11/27/96 Fourth Circuit Order 1a

11/2/95 District Court Order 16a

7/1/94 Complaint 25a

TABLE OF CONTENTS – Continued

Page

Tyson Affidavit 54a

Ginn Affidavit 60a

Matthews Affidavit 67a

TABLE OF AUTHORITIES

Page

CASES

Acosta v. City and County of San Francisco, 83 F.3d 1143 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 514 (1996) 7, 8, 9

Behrens v. Pelletier, 116 S. Ct. 834 (1996) ... 9, 10, 11, 12

Bell v. Wolfish, 441 U.S. 520 (1979) 6

Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) 16

Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 462 (1992) 16

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 11, 13, 16

Hodge v. Jones, 31 F.3d 157 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 581 (1994) 11

Johnson v. Jones, 115 S. Ct. 2151 (1995) 5, 9, 10, 11, 12, 13

Mitchell v. Forsyth, 472 U.S. 511 (1985) 10

Pittman v. Nelms, 87 F.3d 116 (4th Cir. 1996) 16

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, 504 U.S. 915 (1992) 16

Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) 8, 9

Tennessee v. Garner, 471 U.S. 1 (1985) 14, 15

RULES

United States Supreme Court Rule 10 16

United States Supreme Court Rule 15.2 4

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Grayham Keesler, Daniel Peters, James P. Morgan, Chester Hill and the City of Goldsboro, North Carolina respectfully request that the Court deny the Petition of Leonard Edmundson, Alene Rouse Yelverton, Robert Yelverton and Erin Jannell Shirley for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF CASE

A. Statement of Facts

Petitioners' version of the facts, which consists of the allegations in their Complaint and the affidavits of two eyewitnesses, reveals the following. On July 2, 1992, Respondents Grayham Keesler and Daniel Peters, officers with the Goldsboro Police Department, went to the Franklin Baking Company to arrest James Turnage, a Franklin Baking route salesman, for felony possession with intent to sell and deliver marijuana and felony sale and delivery of marijuana. (App. 32).[1] After Officers Keesler and Peters showed Turnage the warrant for his arrest, Turnage asked if he could finish unloading his bread truck and the officers agreed. (App. 32-33). While unloading his bread truck, Mr. Turnage suddenly ran from the Franklin Baking warehouse to his personal

[1] References to the Appendix ("App.") are to the appendix attached to this brief. References to the Joint Appendix ("J.A.") are to the appendix filed by the parties in the Fourth Circuit Court of Appeals.

pickup truck, which was located in a gravel parking lot enclosed by a fence. (App. 34).

Turnage got into his pickup truck, locked the doors and started the engine. (App. 34). Officer Keesler ran to the passenger door of the truck and demanded that Turnage stop the truck. (App. 34). Disregarding Keesler's commands, Turnage backed his truck up until the front of the truck was facing the gate leading out of the warehouse parking lot. (App. 35, 57). Again yelling for Turnage to stop, Keesler followed the truck, ending up in a position near the driver's side "less than three feet in front of Mr. Turnage's truck." (App. 57-58). As Turnage drove forward and right toward the parking lot exit, Officer Keesler "pushed off the truck and moved over to the driver's side of the truck out of the path of the truck." (App. 58). Keesler then shot into the car through the driver's side window (App. 58) and ran beside the truck, shooting into the driver's side window two or three more times. (App. 65). The truck then exited the parking lot into the street where it eventually ran into the guy wire of a utility pole. (App. 35.) Turnage died as a result of the shots. (App. 35). Petitioners' eye-witnesses testified that they did not know where Officer Peters was during this incident or if he fired his weapon. (App. 58, 65).

The affidavits submitted by Respondent officers in support of their motion for summary judgment show that, when Turnage finished backing up his truck to head out the parking lot exit, Keesler was in front of the truck on the passenger's side and Peters was positioned near the driver's side door. (J.A. 182). Turnage then raced the truck's engine, turned the steering wheel to the right and began accelerating forward. (J.A. 182, 222-23). Officers

Keesler and Peters continued to yell for Turnage to stop or they would fire their weapons, but Turnage ignored these warnings. (J.A. 182, 223). At this point, Officer Keesler had placed his left hand on the truck's hood; in his right hand he held his gun over the hood and pointed towards Turnage. (J.A. 182). With the truck's tires spinning and throwing gravel, Turnage then drove his pickup truck forward and to the right towards Officer Keesler, striking Keesler in the chest with the truck's grill and hood. (J.A. 182, 222-23). Officer Keesler, while trying to back up to avoid being run over, fired one shot through the windshield just slightly on the passenger's side, right of center. (J.A. 182-83). Almost at the same time, Officer Peters fired two shots at the truck from the driver's side, believing that Turnage was about to run over Officer Keesler. (J.A. 223). After the shots were fired, the truck slowed momentarily and Keesler turned, rolled to his right and cleared the vehicle on the driver's side. (J.A. 183, 223).

The affidavits submitted by Respondent officers were corroborated by the affidavits of two eye-witnesses, by the affidavits of two experts who examined the physical evidence, and by the investigation reports completed by the State Bureau of Investigation ("SBI"). The tire impressions on the gravel parking lot, which the SBI analyzed, revealed that Turnage's truck accelerated quickly backward and then forward. (App. 71, 73). The SBI investigation and ballistics reports revealed that one bullet was fired from Officer Keesler's weapon. The physical evidence showed that the path of this bullet was from a position in front of and slightly to the right of the truck's front center, thus placing Keesler in front of the truck on

the passenger's side, rather than in front of the driver. (App. 70-72, J.A. 138). The SBI investigation also established that two bullets were fired by Officer Peters, one from just slightly in front of the driver's side door and a second shot from beside the driver's side door. (App. 70-71, J.A. 138-39). Finally, Officer Keesler's left palm print was found on the passenger side of the hood of the truck. (App. 72).

B. Proceedings Below

Pursuant to United States Supreme Court Rule 15.2, Respondents wish to correct two misstatements of fact in Petitioners' Brief concerning the proceedings in the lower courts. First, Petitioners state that the district court, "relying" on the affidavits submitted by Petitioners, "concluded that no reasonable officer in the position of Keesler and Peters could have believed that he had probable cause to believe that Turnage posed a significant threat of death or serious physical injury, and, therefore, rejected the respondents' qualified immunity defense." (Petition at 6). The district court denied Respondents' qualified immunity defense because it felt that the two eye-witness affidavits submitted by Petitioners were "sufficient to create a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional." (App. 23). The district court did not, as Petitioners assert, decide in their favor the issue of whether Respondent officers acted reasonably; it merely determined that there were material factual disputes concerning the officers' actions.

Second, Petitioners assert that Judge Hall dissented to the Fourth Circuit's majority opinion because he felt that the majority ignored "the factual determinations made by the district court" and therefore exceeded their "authority in this interlocutory appeal." (Petition at 6). In his dissent, Judge Hall states that he "would dismiss this interlocutory appeal because I believe that the district court's order 'determines only a question of evidentiary sufficiency, i.e., which facts a party may, or may not, be able to prove at trial.' " (App. 13). Contrary to Plaintiffs' contention, Judge Hall did not dissent because he felt that the majority ignored "factual determinations" made by the district court. He dissented because he felt that the district court's determination that there were material factual disputes precluded Respondents' appeal under *Johnson v. Jones*, 115 S. Ct. 2151 (1995), an issue that Petitioners do not raise before this Court.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH ANY DECISIONS OF OTHER CIRCUIT COURTS

Petitioners do not dispute that the Fourth Circuit correctly stated the proper legal standards to be applied in this action. As the Fourth Circuit determined, the qualified immunity analysis in the context of a claim that law enforcement officers used excessive force requires the court to apply the Fourth Amendment's objective reasonableness standard. (App. 8-9); *see Graham v. Connor,*

490 U.S. 386, 395 (1989). The Fourth Circuit also correctly noted *Graham's* instructions that

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' Johnson v. Glick, 481 F.2d at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-97; App. 9. Finally, the Fourth Circuit properly stated that the test of reasonableness under the Fourth Amendment " 'is not capable of precise definition or mechanical application' " and its "proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396, *quoting*, *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); App. 9.

Petitioners dispute only the Fourth Circuit's application of these proper legal standards to the facts of this case. Under the evidence presented by Petitioners, Turnage ran to his truck, locked the doors, ignored several commands by Officers Keesler and Peters to stop, and began backing his truck up to head out the parking lot exit. (App. 34-35, 57-58). As Turnage then drove forward

toward the exit, Keesler was forced to "push[ ] off the truck and move[ ] over to the driver's side of the truck out of the path of the truck." (App. 58). Positioned "within two or three feet of the hood" of Turnage's truck as Turnage drove toward the parking lot exit, Keesler fired three shots at Turnage. (App. 35, 65). Based on these facts, the Fourth Circuit concluded that Keesler's actions were objectively reasonable "when considering the extremely dangerous circumstances confronted by the officers – a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck." (App. 9-10).

Petitioners contend that this application of the *Graham v. Connor* excessive force standards conflicts with two decisions from other circuits. However, Petitioners ignore *Graham's* warning that the test of objective reasonableness has no "mechanical application" and must be applied with "careful attention" to the facts of each particular case. *Graham*, 490 U.S. at 396. In the two circuit decisions cited by Petitioners, the courts, applying this fact-specific analysis, reached decisions contrary to the Fourth Circuit's opinion in this action simply because they were not faced with facts similar to the instant facts. In *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 514 (1996), the Ninth Circuit's determination that the police officer was not entitled to qualified immunity was based primarily on the jury's factual finding that, when the officer shot at the suspect inside the car, the "car was moving or rolling very slowly from a standstill, so slowly that he [the officer] could not have reasonably believed that it posed a threat of great bodily harm." As the court concluded,

qualified immunity was not appropriate "because a reasonable officer could not have reasonably believed that shooting at the driver of the slowly moving car was lawful." *Id.* at 1148.

In contrast, Petitioners in this action have presented no evidence that Turnage's truck was moving slowly in his frantic attempt to escape through the parking lot exit. Indeed, Petitioners' evidence supports the conclusion that the truck was moving quickly. In the affidavits submitted by Petitioners, the eye-witnesses admitted that Officer Keesler had to "run" to catch up with Turnage's truck as he backed it up (App. 57) and "ran" beside the truck as it was moving forward toward the exit (App. 65), language inconsistent with a slow-moving vehicle. The fact that the car was "moving or rolling very slowly from a standstill" was dispositive for the Ninth Circuit in *Acosta* but simply is not present in the instant action.

Similarly, this action is factually distinguishable from the circumstances in *Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the second appellate "conflict" asserted by Petitioners. In *Starks*, the key fact in the court's qualified immunity analysis was that, under the plaintiffs' version of the facts, the officer unreasonably jumped in front of the moving car driven by the suspect, leaving the suspect no time to brake. The court concluded that the officer could not "be granted immunity because, again taking the plaintiffs' version of the facts, his own unreasonable action prompted the danger he faced." *Id.* at 234. Unlike *Starks*, there are no allegations in this action that either Officer Keesler or Officer Peters unreasonably jumped in front of Turnage's truck or in any way created the dangerous situation.

Thus, no conflict exists between the Fourth Circuit's opinion in this action and the *Starks* and *Acosta* opinions. In all three decisions, the courts properly follow the *Graham v. Connor* requirement to apply the objective reasonableness test under the particular facts and circumstances of each case. The Fourth Circuit reached a different conclusion in this case than the *Starks* and *Acosta* courts simply because the dispositive facts of this case, that the officer was within two to three feet of a rapidly moving car driven by a fleeing felon, were not present in those cases. Petitioners attempt to create a conflict by asserting that the Fourth Circuit's opinion declares that any and all police officers are entitled to qualified immunity if they are "within two to three feet of a moving vehicle." (Petition at 13, 16). The court's opinion, however, is carefully tailored and restricted to the specific facts of this action, where a police officer finds himself in close proximity to a rapidly moving vehicle driven by a fleeing felon. The Fourth Circuit's decision, correctly applying the objective reasonableness test to the specific facts of this action, conflicts with no other circuit decisions.

II. THE DECISION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH *JOHNSON v. JONES*.

Petitioners argue that, by failing to rely on the facts set forth by the district court in its opinion, the Fourth Circuit created a conflict with *Johnson v. Jones*, 115 S. Ct. 2151 (1995). This argument misreads the *Johnson* and *Behrens* decisions as well as the Fourth Circuit's decision in this action.

First, Petitioners incorrectly state that *Johnson* binds the appellate court to the "factual determinations made by the district court." (Petition at 16). Citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the *Johnson* court limited the appellate court's review of a qualified immunity decision to whether "certain given facts showed a violation of 'clearly established law.' " *Johnson*, 115 S. Ct. at ___, 132 L. Ed. 2d at 246. These "certain given facts" are the facts as presented by the plaintiff, not the smaller subset of the plaintiff's evidence which the district court chooses to include in its opinion. As stated in *Mitchell*, "we emphasize at this point that the appealable issue is a purely legal one: whether the *facts alleged (by the plaintiff*, or, in some cases, the defendant) support a claim of violation of clearly established law." *Mitchell*, 472 U.S. at 528 (emphasis added).[2]

The Court held in *Johnson* that the issue of whether the evidence is sufficient to support a finding that particular conduct occurred is not immediately appealable solely because it happens to arise in a qualified immunity case. However, the question on a summary judgment motion of whether "certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law" remains immediately appealable. *Behrens v. Pelletier*, 116 S. Ct. 834, ___, 133 L. Ed. 2d 773, 788 (1996). As explained in *Behrens*,

---

[2] The *Mitchell* court noted that an appellate court would review the defendant's "version of the facts" in those cases where "the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law." *Mitchell*, 472 U.S. at 528.

> Here the District Court's denial of petitioner's summary judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' This argument was presented by petitioner in the trial court, and there is no apparent impediment to its being raised on appeal.

Id. The standard for review of this legal question is *de novo*, a point which Petitioners conceded in their brief before the Fourth Circuit. *See, e.g., Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 581 (1994). Thus, the appellate court may substitute in place of the district court's decision its determination of whether the conduct attributed to the defendant meets the *Harlow* standard of objective legal reasonableness.

This is the issue that properly was appealed in this case. The Fourth Circuit was not bound by what Petitioners label in their Brief "factual determinations" made by the district court. (Petition at 16). The Fourth Circuit, on appeal, was entitled to look at the "conduct attributed to petitioner [the officers] (which was controverted)" and answer the immediately appealable legal question *de novo* of whether that conduct "constituted a violation of clearly established law" or "met the *Harlow* standard of 'objective legal reasonableness.' " *Behrens*, 116 S. Ct. at ___, 133 L. Ed. 2d at 788.

As further explained in *Behrens*, the court looks "to the evidence before it (in the light most favorable to the plaintiff)" when the qualified immunity issue is raised on a motion for summary judgment. *Id.* at ___, 133 L. Ed. 2d at 785. In this case, the Fourth Circuit did just that. It did not rely upon the contrary evidence submitted by Keesler that he fired only one shot and that he did that while in front of the truck rather than beside it. The Fourth Circuit did not rely on the ballistics or forensics evidence in the SBI report that showed that Keesler fired one shot while in front of the truck and that Peters fired two shots from beside the truck while his partner was in danger. Respondents did not present on appeal and the Fourth Circuit did not review the "evidentiary sufficiency" issue of whether a jury could find "that particular conduct occurred" upon considering the conflict that the district court found between the statements of two eyewitnesses and the SBI evidence. *See Behrens*, 516 U.S. at ___, 133 L. Ed. 2d at 787 ("*every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see. Fed. R. Civ. Proc. 56, and *Johnson* surely does not mean that *every* denial of summary judgment is nonappealable") (emphasis in original). The Fourth Circuit properly followed *Behrens* and there is no conflict with *Johnson*.

Second, even if the Fourth Circuit were limited to the evidence the district court set forth in its opinion in denying summary judgment, the Fourth Circuit made no contrary "findings." In concluding that the actions of Officers Keesler and Peters were objectively reasonable, which was the permissible issue on appeal under *Behrens*, the Fourth Circuit relied on the evidence considered in

the light most favorable to Petitioners that "Keesler, while positioned within two or three feet of a rapidly moving truck, fired all three shots, and Peters was at no time in the vicinity of the truck." (App. 9). These are the facts, as alleged by Petitioners, which the district court states in its opinion. The district court noted that Keesler was "two to four feet" from the truck, that Keesler fired all the shots, and that Peters was not near the truck. (App. 22). The district court also noted that Keesler ran beside the truck as it drove toward the exit, indicating its rapid movement. (App. 22).

Contrary to Petitioners' assertion, the district court did not rely on, and did not even cite, the gratuitous opinions of Petitioners' witnesses that, in their opinions, the officers were not in serious danger during the incident. Nor as Petitioners insist did the district court determine that Keesler "was not in serious danger of injury" (Petition at 18); it held that this was a genuine issue of material fact. (App. 23). Thus, the Fourth Circuit, although not bound to the evidence recited by the district court, did not step beyond that evidence in answering *de novo* the appealable legal question that the conduct attributed to the officers, considered in the light most favorable to Petitioners, met the *Harlow* standard of objective legal reasonableness. Petitioners have stated no conflict between the Fourth Circuit's opinion and *Johnson v. Jones*.

III. THE DECISION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH *TENNESSEE v. GARNER*.

Petitioners argue that the Fourth Circuit's opinion conflicts with the standard set forth in *Tennessee v. Garner*, 471 U.S. 1, 3 (1985), that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Again, Petitioners base this argument on a misapprehension of the Fourth Circuit's holding.

Under the *Graham v. Connor* test which requires a court to evaluate excessive force claims under the "facts and circumstances of each particular case," the Fourth Circuit determined that Officer Keesler "under the circumstances confronted" by him, acted objectively reasonable. (App. 11). The situation facing Keesler, as presented by Petitioners' evidence, was a tense, rapidly evolving crisis in which Keesler, in serious danger of injury, fired his weapon while positioned within two to three feet of a rapidly moving vehicle driven by a felony suspect determined to escape. The Fourth Circuit's holding was limited to these specific facts. Petitioners do not dispute, nor can they, that those particular facts meet the *Tennessee v. Garner* standard and thus warrant the use of deadly force. Instead, Petitioners attempt to extrapolate the Fourth Circuit's holding to encompass *any* and *all* situations in which a police officer is close to a moving vehicle driven by a felony suspect. (Petition at 21). The Fourth Circuit's opinion does not expressly or impliedly sanction such an

extrapolation. No conflict exists between the Fourth Circuit's opinion and *Tennessee v. Garner* because the Fourth Circuit properly limited its holding to the specific set of facts alleged by Petitioners.

IV. THE FOURTH CIRCUIT'S OPINION IS NOT ERRONEOUS AND PRESENTS NO QUESTIONS WORTHY OF REVIEW BY THIS COURT

Petitioners contend that the Fourth Circuit's opinion is erroneous because it gives free rein to all police officers to "run[ ] beside and shoot[ ] into the driver's-side window of a vehicle that is being driven away from the officer by a fleeing felony suspect." (Petition at 22). This is not a logical or legally plausible reading of the Fourth Circuit's holding. The Fourth Circuit found that Officer Keesler acted objectively reasonable, and therefore was entitled to qualified immunity, because he shot at a time when he was in serious danger of injury – when he was positioned within two to three feet of a rapidly moving truck driven by a fleeing felony suspect. Petitioners would extend this opinion to allow police officers to run beside and shoot at a vehicle driven by a fleeing suspect, regardless of whether the officer is within two to three feet of the vehicle, regardless of whether it is rapidly moving and regardless of whether the situation is a tense and uncertain one in which the officer reasonably believes he is in serious danger of injury. The Fourth Circuit carefully limited its holding to the facts of this case and nothing in the opinion authorizes a grand-scale application of its holding to dissimilar facts.

Contrary to Petitioners' contention, this decision is not a departure from Fourth Circuit law or from the law of other circuits. It follows the lead of several decisions which, applying *Graham v. Connor,* hold that police officers are entitled to qualified immunity under factual circumstances similar to those presented here. *See, e.g., Pittman v. Nelms,* 87 F.3d 116 (4th Cir. 1996) (officer entitled to qualified immunity where he fired at a car when it was twenty-five feet away moving away from the officers and after his partner had been thrown aside by the car); *Drewitt v. Pratt,* 999 F.2d 774 (4th Cir. 1993) (officer acted objectively reasonable in firing a shot into the suspect's car about the time that the car hit the officer); *Fraire v. City of Arlington,* 957 F.2d 1268 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 462 (1992) (qualified immunity allowed where officer fired shot when moving truck was within ten to fifteen feet from the officer); *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992), *cert. denied,* 504 U.S. 915 (1992) (qualified immunity upheld where officer fired shot as car drove past him in tense, rapidly evolving situation).

Finally, it is important that Petitioners do not argue that the Fourth Circuit misstated the law of excessive force or of qualified immunity. Indeed, the Fourth Circuit correctly stated the proper legal standards to be applied as set forth in *Graham v. Connor,* 490 U.S. 386 (1989), and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Petitioners claim instead that the Fourth Circuit misapplied these legal standards to the facts of this case, arguing that the instant facts constitute excessive force under *Graham.* Even if such a fact-specific argument had merit, it does not present a question for review by this Court. *See* United States Supreme Court Rule 10 ("a petition for a writ of certiorari

is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). The Fourth Circuit's opinion, in line with its prior decisions, decisions of other circuits and decisions of this Court, is not erroneous and presents no questions worthy of review by this Court.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted this 8 day of May, 1997.

KENNETH R. WOOTEN
Counsel of Record
For the firm of
WARD AND SMITH, P.A.
1001 College Court
Post Office Box 867
New Bern, North Carolina
28563-0867
Telephone: (919) 633-1000
Facsimile: (919) 636-2121
Attorneys for Respondents

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, a Guardian ad Litem for the above,

Plaintiffs-Appellees,

v.

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department,

Defendants-Appellants,

and

THE CITY OF GOLDSBORO POLICE DEPARTMENT; CITY OF GOLDSBORO,

Defendants.

No. 95-3125

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage, Deceased; ALENE ROUSE YELVERTON; ROBERT YELVERTON; CRAIG YELVERTON; KAREN BENNETT; KATHY EDMUNDSON; LIBBY PEELE; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks; JANICE STOCKS, a Guardian ad Litem for the above,

Plaintiffs-Appellees,

v.

CITY OF GOLDSBORO,

Defendant-Appellant,

and

GRAYHAM KEESLER, individually and in his official capacity as an officer of the City of Goldsboro Police Department; DANIEL PETERS, individually and in his official capacity as an officer of the City of Goldsboro Police Department; JAMES P. MORGAN, individually and in his official capacity as Police Chief of the City of Goldsboro Police Department; CHESTER HILL, individually and in his official capacity as the Police Chief for the City of Goldsboro Police Department; THE CITY OF GOLDSBORO POLICE DEPARTMENT,

Defendants.

No. 95-3132

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, District Judge.
(CA-94-467-5-BO(3))

Argued: September 26, 1996

Decided: November 27, 1996

Before HALL, NIEMEYER, and HAMILTON, Circuit Judges.

Vacated and remanded with instructions by unpublished opinion. Judge Hamilton wrote the majority opinion, in which Judge Niemeyer joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellants. Zebulon Dyer Anderson, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellees. **ON BRIEF:** John R. Green, WARD & SMITH, P.A., New Bern, North Carolina, for Appellants. James K. Dorsett, III, Steven M. Sartorio, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

HAMILTON, Circuit Judge:

Pursuant to 42 U.S.C. § 1983, the plaintiff/appellee, Leonard Edmundson, administrator of the estate of James Richard Turnage, sued the defendants/appellants, Officers Grayham Keesler and Daniel Peters, alleging that Keesler and Peters deprived Turnage of his rights guaranteed by the Fourth and Fourteenth Amendments when Turnage was shot while attempting to flee. The plaintiff also alleged that the defendants/appellants, Chester Hill, Chief of Police of the Goldsboro Police Department, and James Morgan, former Chief of Police of the Goldsboro Police Department, were liable for the shooting of Turnage under a theory of supervisory liability, and that the defendant/appellant, the City of Goldsboro, North Carolina, was independently liable for providing its officers inadequate training. *See* 42 U.S.C. § 1983.[1] The defendants appeal the district court's denial of their motion for summary judgment on the plaintiff's § 1983 claims. For reasons that follow, we vacate the district court's order denying the defendants' motion for summary judgment on the plaintiff's § 1983 claims and remand with instructions to enter judgment in favor of the defendants on these claims. Because all of the federal claims are without merit, we instruct the district court on remand to dismiss without prejudice the remaining state-law claims.

---

[1] In addition to the constitutional claims, several state law claims were raised by the estate and members of Turnage's family, none of which are before the court.

I

The evidence submitted by the defendants in support of their motion for summary judgment revealed the following. According to Keesler and Peters, on July 2, 1992, they went to the Franklin Baking Company in Goldsboro, North Carolina, to arrest James Richard Turnage, a Franklin Baking Company employee, for felony possession with intent to distribute and distribution of marijuana. When the officers presented Turnage with the arrest warrant, Turnage asked if he could finish unloading his delivery truck. The officers acquiesced.

While Turnage was unloading his truck, he ran from the bakery warehouse to his personal pickup truck, which was located in the gravel parking lot adjacent to the warehouse. A fence surrounded the parking lot, with one gate providing the only means of exiting the lot.

Seeing Turnage run for his truck, Keesler and Peters ran after him, calling for him to stop. Refusing to heed the officers' command, Turnage got into his truck, locked the doors, and started the engine. Turnage then backed up his truck in a semi-circular manner so that the front of his truck was facing the gate exiting the parking lot. When the truck stopped, Keesler was positioned in front of the truck, toward the passenger's side, and Peters was positioned near the driver's side door.

As Turnage accelerated quickly forward and slightly to the right, toward the exit, the truck struck Keesler but did not knock him down. At this point, Keesler stood with his chest and left hand on the hood and with his gun pointed at Turnage. To avoid being run over by the truck, Keesler continued to back up as the truck accelerated

forward. When Keesler perceived that "Turnage was not going to stop, but that he was going to continue accelerating into [him]," (J.A. 182), Keesler fired one shot through the windshield. Believing that Keesler's life was in danger, Peters fired two shots through the driver's side window.

After the shots, the truck proceeded through the gate, into the street, and stopped after it hit a pole. As a result of the injuries he received from the shots, Turnage died.

The defendants also submitted the affidavits of two witnesses to the shooting who confirmed the officers' account. One witness, E.T. Franklin Sr., observed Keesler in front of Turnage's truck and firing only after Turnage drove toward Keesler. Franklin also observed Peters on the driver's side of the truck and firing his shots after Keesler's. Another witness, Jimmy Stewart, observed Keesler in front of Turnage's truck with his left hand on the hood as Turnage drove forward toward Keesler. Stewart also averred that Keesler fired his weapon as the truck moved toward Keesler.

The defendants also submitted the affidavits of two experts who examined and evaluated the physical evidence. Their examination and evaluation of the physical evidence also confirmed the officers' account. Tire impressions on the gravel parking lot revealed that the truck accelerated quickly backward and then accelerated forward. Ballistic reports revealed that one bullet was fired from Keesler's weapon, and two from Peters' weapon. The physical evidence showed that the path of one bullet was from a position in front of and slightly to the left of the truck's front center. The physical evidence

also showed that one bullet came from a position slightly in front of the driver's side door and another from a position beside the driver's side door. Finally, Keesler's left palm print was found on the passenger side of the hood of the truck.

In response to the defendants' motion for summary judgment, the plaintiff submitted affidavits from two of Turnage's supervisors, Lionel Ginn and William Tyson. According to Ginn, as Turnage's truck moved backwards in a semi-circular direction, Keesler followed the truck, placing him in a position two to three feet from the front corner on the driver's side of the truck. As the truck moved forward and to the right toward the exit, Keesler fired his weapon at Turnage and then ran beside the truck shooting again twice into the driver's side. According to Tyson, as Turnage's truck moved forward and to the right toward the exit, Keesler "pushed off the truck and moved over to the driver's side of the truck out of the path of the truck." (J.A. 313). Keesler then fired into the truck through the driver's side window. According to Ginn and Tyson, Peters was neither behind the truck nor in their field of vision. As the truck left the lot, Ginn and Tyson saw Peters near the front gate of the parking lot.

The district court denied the defendants' motion for summary judgment based on qualified immunity, concluding that the affidavits of the plaintiff's two eyewitnesses created "a genuine issue of material fact critical to the legal determination of whether reasonable officers

would have known that their actions were unconstitutional." (J.A. 324). The defendants appeal.[2]

II

We first address the defendants' contention that Keesler and Peters were entitled to qualified immunity. Under the doctrine of qualified immunity, government officials are immune from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Consequently, qualified immunity attaches when the government actor's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A qualified immunity defense is established if: (1) the government actor's action did not violate clearly established law, or (2) it was objectively reasonable for the government actor to believe that his action did not violate such law. *See Anderson*, 483 U.S. at 641; *Harlow*, 457 U.S. at 818-19.

It is clearly established that under the Fourth Amendment individuals have the right to be free of excessive force and that there are constitutional limitations on the use of deadly force during the course of an arrest. *See Graham v. Connor*, 490 U.S. 386, 395-96 (1989).

---

[2] Because this interlocutory appeal concerns the issue of whether, based on the facts viewed in a light most favorable to the plaintiff, the officers' conduct violated clearly established law, we have jurisdiction. *See Behrens v. Pelletier*, 116 S.Ct. 834 (1996); *Johnson v. Jones*, 115 S.Ct. 2151 (1995).

Thus, Keesler and Peters' entitlement to qualified immunity turns on an assessment of the objective reasonableness of their belief that their conduct did not violate Turnage's right to be free of excessive force.

In determining whether the force used to effect a seizure was reasonable, and, therefore, not excessive, we apply an objective reasonableness test that examines "the facts and circumstances of each particular case," including, among other factors, "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

The objective reasonableness test is met if "officers of reasonable competence could disagree" on the legality of the defendant's actions. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Supreme Court has made it clear that an officer's actions are not to be assessed with 20/20 hindsight. *Graham*, 490 U.S. at 396. Rather, "qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances." *Lennon v. Miller*, 66 F.3d 416, 424 (2d Cir.1995).

Here, the facts in a light most favorable to the plaintiff demonstrate that Keesler, while positioned within two or three feet of a rapidly moving truck, fired all three shots, and Peters was at no time in the vicinity of the truck. Even in this light, the officers were entitled to qualified immunity because at the moment when Keesler used deadly force against Turnage, it was objectively reasonable for Keesler to view the use of deadly force as not excessive when considering the extremely dangerous

circumstances confronted by the officers – a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck. Indeed, in similar circumstances, we have upheld the use of deadly force.

For example, in *Drewitt v. Pratt*, after observing Drewitt driving recklessly, Officer Pratt ran toward the car with his gun drawn, ordering Drewitt to stop. 999 F.2d 774, 776 (4th Cir.1993). Instead, Drewitt sped up, catching Pratt on the hood of the car. *Id.* At that point, Pratt fired. *Id.* We affirmed the district court's holding that Pratt's actions were objectively reasonable and, therefore, Pratt was entitled to qualified immunity. *Id.* at 780.

We reached a similar result in *Pittman v. Nelms*, 87 F.3d 116 (4th Cir.1996). There, the plaintiff was a passenger in a vehicle driven by Timothy Hudson. Officers Nelms and Banks approached the vehicle and confronted Hudson. As Hudson attempted to drive away, Banks's arm became entangled inside the window of the vehicle. Banks was dragged twenty-five to thirty feet before his arm finally came free, and he was thrown aside. *Id.* at 118. Banks then rose and fired at the car. Nelms, who could see that Banks had not been run over and killed, also shot at the vehicle when it was approximately twenty-five feet away; the shot that Nelms fired struck Pittman. *Id.* at 120. We held that the force used by Officer Nelms was not excessive, and, therefore, Nelms properly was entitled to qualified immunity. *Id.*

This case is nearly indistinguishable from *Drewitt* and *Pittman*. Similar to *Drewitt* and *Pittman*, this case involved circumstances that were "tense, uncertain, and

rapidly evolving." *Graham*, 490 U.S. at 397. In addition, as in *Drewitt* and *Pittman*, an officer, here Keesler, was in serious danger of injury – Keesler was within two to three feet of a rapidly moving truck. The law does not require that an officer be struck before he can discharge his weapon in an effort to protect himself from harm. Indeed, similar perceptions of danger have served as a basis for qualified immunity even where those perceptions were mistaken. *See, e.g., Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir.1991) (holding that officer's perception that suspect was reaching for gun reasonable when suspect was in fact holding only a bottle).

Under the circumstances confronted by Keesler, "an objectively reasonable officer certainly could have believed that his decision to fire was legally justified." *Pittman*, 87 F.3d at 120. Accordingly, Keesler was entitled to qualified immunity.

With regard to Peters, plaintiff's evidence places him at a distance from the events and suggests that he did not apply any force to Turnage. Because Keesler was entitled to qualified immunity, Peters, as a non-shooter, was as well. *See Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir.1996) ("In the absence of any underlying use of excessive force against Wilson, liability cannot be placed on either the non-shooting officers, a supervisor, or the City.").[3]

---

[3] We note that with respect to Peters, we would reach the same result even if he discharged his weapon, which is the case under the defendants' version of the facts. Under *Drewitt* and *Pittman*, in light of the dynamic circumstances confronted by the officers, Peters could have reasonably believed that Keesler was in imminent danger.

III

Our conclusion that the officers acted reasonably is dispositive of the § 1983 claims against Hill, Morgan, and the City of Goldsboro. In the absence of any constitutional violation by the officers, the claims against Hill, Morgan, and the City of Goldsboro fail. *See id.; Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir.1991) (holding that a claim of inadequate training cannot be established under § 1983 absent a finding of a constitutional violation by the person being supervised), *cert. denied*, 502 U.S. 1095 (1992); *see also Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir.1990) ("Because . . . there was no constitutional violation we need not reach the question of whether a municipal policy was responsible for the officers' actions. . . . Plaintiff's effort to turn this lawsuit into one for inadequate training of personnel . . . is unavailing where there has been no underlying constitutional infraction.").

IV

For reasons stated herein, we vacate the district court's order denying the defendants' motion for summary judgment on the plaintiff's § 1983 claims and remand with instructions to enter judgment in favor of the defendants on these claims. On remand, we instruct the district court to dismiss the state-law claims without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well."); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir.1996) (directing dismissal without prejudice of state-law claims

on remand after holding district court erred in failing to grant summary judgment to the defendant on the plaintiff's § 1983 claims on the basis of qualified immunity).

VACATED AND REMANDED WITH INSTRUCTIONS

HALL, Circuit Judge, dissenting:

"Interlocutory appeals . . . are the exception, not the rule." *Johnson v. Jones,* 115 S.Ct. 2151, 2154 (1995). I would dismiss this interlocutory appeal because I believe that the district court's order "determines only a question of 'evidentiary sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* at 2156.

With regard to situations involving fleeing suspects, the law was clearly established in 1992 that the use of deadly force is only justified if the officers have "probable cause to believe that [the suspect] pose[d] a significant threat of death or serious injury to the officer or others." *Tennessee v. Garner,* 471 U.S. 1, 3 (1985). I agree that the analysis of qualified immunity in excessive force cases requires an examination of the particular circumstances faced by the officers to determine whether it was objectively reasonable for the officers to act as they did. *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). I disagree with the majority's conclusion that the order involved in this interlocutory appeal turned on whether the plaintiff's version of the facts made out a violation of clearly established law. *See ante* at 6 n. 2.

After a detailed examination of the evidence, the district court concluded that "the submission by plaintiffs

of the affidavits of two eyewitnesses[1] is sufficient to create a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional." *Edmundson v. Keesler*, No. 5:94-CV-467-BO(3) at 8-9 (E.D.N.C. Nov. 6, 1995) (order). In other words, the district court felt that the picture painted by Ginn and Tyson was that Keesler ran alongside the truck as it was pulling away from him, and that a permissible inference from this picture was that the shots were fired solely to stop the fleeing Turnage. Under what I think we all agree was the established law, this is a picture of excessive force.

The majority reduces the picture drawn by the plaintiff to "extremely dangerous circumstances confronted by the officers – a rapidly moving truck driven by a fleeing felon and Keesler's close proximity to the truck." *Ante* at 8. The district court, however, felt that much of what actually happened was open to dispute, particularly whether the truck was coming toward Keesler or moving away from him and toward the parking lot exit when the shots were fired. Whether Keesler was actually in danger,

---

[1] Affidavit of Lionel Ginn: "Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. . . . When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing."

Affidavit of William Scott Tyson: "Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit."

whether he appeared to be in danger, whether he could reasonably have thought he was in danger, and whether he and his partner fired *solely* to stop the fleeing Turnage, are clearly material facts. Whether *we* believe the record supports or even dictates a finding in the officers' favor on the immunity issue[2] is irrelevant to the inquiry under *Johnson v. Jones;* all that matters at this point is that the *district court* thought that these factual disputes were genuine.

I respectfully dissent.

---

[2] *Pittman v. Nelms,* 87 F.3d 116 (4th Cir.1996), which is relied upon by the majority, *see ante* at 8, and which involved facts very similar to those in our case, was an appeal from a final order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 5:94-CV-467-BO(3)

LEONARD EDMUNDSON et al., Plaintiffs, v. GRAYHAM KEESLER et al., Defendants.	)	ORDER (Filed Nov. 6, 1995)

This matter is before the undersigned on defendants' motion for partial summary judgment on the grounds of qualified immunity. The issue is whether defendant officers acted reasonably in using lethal force to serve an arrest warrant on a fleeing suspect. Finding a genuine issue of material fact necessary to the determination of the reasonableness of the officers' actions, the court denies defendants' motion for partial summary judgment.

On July 2, 1992, defendant officers Grayham Keesler and Daniel Peters traveled to the Franklin Baking Company in Goldsboro, North Carolina to serve an arrest warrant on Ricky Turnage, an employee of Franklin. The warrant authorized the arrest of Turnage for selling 6.8 grams of marijuana five months earlier. When the defendant officers confronted Turnage, he asked if he could finish unloading his delivery truck. The officers acceded to his request. Some twenty to forty minutes later while the officers were conversing with Turnage's supervisors, Turnage ran out of the warehouse and into the parking

lot in which his personal truck was parked. The officers followed. The parties' accounts of the events in the parking lot differ dramatically. In general terms, defendants argue that Turnage was in the process of running over Officer Keesler when the officers shot Turnage to death. Plaintiffs, on the other hand, allege that neither Keesler nor Peters was in danger of serious bodily harm. The evidence supporting each party's version is discussed below.

Defendants Keesler, Peters, Morgan, and Hill move for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that the doctrine of qualified immunity shields them from liability in this case. In order to grant a motion for summary judgment, the court must determine, in the light most favorable to the non-moving party, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Under Rule 56, a party may move with or without supporting affidavit. Fed. R. Civ. P. 56(a). When a motion is made and supported, the non-moving party must set forth specific facts showing there is a genuine issue for trial in order to avoid summary judgment for the moving party if otherwise appropriate. Fed. R. Civ. P. 56(e); *see Celotex v. Catrett*, 477 U.S. 317 (1986). In the instant case both parties have submitted affidavits in support of their arguments on the motion for partial summary judgment.

A court's analysis of the underlying facts on a motion for summary judgment on the grounds of qualified immunity should proceed no differently than in any other context. *Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995). If a plaintiff has alleged a clearly established right,

summary judgment is improper as long as there remains any genuine issue of material fact regarding the actual conduct of the defendants. *Id.* at 359-60. A genuine issue of material fact exists if a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding whether an official is entitled to qualified immunity, the court must (1) identify the specific constitutional right allegedly violated, (2) determine whether that right was clearly established at the time of the alleged violation, and (3) determine whether a reasonable person in the official's position would have known that his conduct would violate that right. *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). The first and second of these inquiries are pure questions of law for the court, but the third, which is also a question of law, may sometimes require factual determinations pertaining to the conduct of a defendant and the attendant circumstances. *Id.*

Plaintiffs have alleged that defendants deprived Turnage of his Fourth and Fourteenth Amendment rights to be free from unreasonable seizure. Specifically, plaintiffs aver that Officers Keesler and Peters used unconstitutionally excessive and lethal force in their attempt to arrest Turnage. Having identified the specific constitutional right allegedly violated, the court must ascertain whether the right was so clearly established as to put a reasonable defendant on notice that his conduct violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Collinson*, 895 F.2d at 998. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the United States Supreme Court held that the use of deadly force to prevent the escape of an apparently

unarmed suspected felon is unconstitutional unless such force "is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3; *see Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991). Additionally, it is undisputed that Keesler and Peters were aware of this limitation on the use of deadly force from the training they had received as officers. Hill Aff. ¶ 8; Morgan Aff. ¶¶ 3, 4, 8. Thus, the court concludes that reasonable officers would be aware of the general right allegedly violated.

The final determination required of the court is whether a reasonable officer would have known that his conduct violated Turnage's rights. A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information could have believed that his conduct was lawful. *Anderson*, 483 U.S. at 641. In evaluating the factual context, the reasonableness standard requires a court to focus on the circumstances as they appeared to exist at the time the events were unfolding, affording interpretive latitude to official judgments. *Gooden v. Howard County*, 954 F.2d 960, 965 (4th Cir. 1992); *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991).

Accordingly, if a reasonable officer in the position of Keesler could have found probable cause to believe that Turnage posed a serious threat of personal bodily harm at the time Keesler shot Turnage, then as a matter of law, Keesler is entitled to qualified immunity. Similarly, if a reasonable officer in the position of Peters could have found probable cause to believe that Turnage posed a serious threat of bodily harm to Keesler at the time Peters

shot Turnage, then Peters is entitled to qualified immunity as a matter of law. Both inquiries, however, require the court to analyze the facts surrounding the relative positions and movements of Turnage, Peters, and Keesler.

According to the affidavits given by Officers Keesler and Peters, they chased Turnage as he fled from the bakery warehouse demanding that he stop. Keesler Aff. ¶ 27; Peters Aff. ¶ 12. Ignoring the officers' demands, Turnage jumped into his truck, started the engine, and backed the truck in a clockwise direction, nearly hitting Peters who stood behind the truck with his pistol drawn. Keesler Aff. ¶¶ 31, 32; Peters Aff. ¶ 13. By the time the truck stopped, Peters had moved to a position near the driver's side door. Keesler Aff. ¶ 33; Peters Aff. ¶ 13. Meanwhile, Keesler stood in front of the truck on the passenger's side. Keesler Aff. ¶ 33; Peters Aff. ¶ 14.

At this point defendants contend that Turnage raced the engine, turned the steering wheel to the right, and accelerated in disregard of warnings being yelled by the officers. Keesler Aff. ¶ 34; Peters Aff. ¶ 14. Turnage's truck then struck Keesler. Keesler Aff. ¶ 35. Standing with his left hand and chest against the hood, Keesler pointed his gun at Turnage. Keesler Aff. ¶ 35; Peters Aff. ¶ 15. While trying to retreat, Keesler fired one shot through the windshield at Turnage. Keesler Aff. ¶ 36. Officer Peters then fired two shots through the driver's side window at Turnage. Peters Aff. ¶ 15. After the shots, the truck proceeded into the street, halting after it hit a guy wire of a utility pole. Keesler Aff. ¶ 41; Peters Aff. ¶¶ 17, 19. Turnage was dead by the time the officers reached the truck. Keesler Aff. ¶ 44; Peters Aff. ¶ 20.

Observations by two witnesses support the account of the officers. The proprietor of the bakery and a delivery person observed Keesler standing in front of Turnage's truck with his left hand on the hood as Turnage drove forward. Stewart Aff. ¶ 4; Franklin Aff. ¶ 4. The witnesses saw Keesler fire his weapon only after Turnage drove in Keesler's direction. Stewart Aff. ¶ 4; Franklin Aff. ¶ 4. The proprietor also witnessed a police officer standing on the driver's side of the truck as it moved forward. Franklin Aff. ¶ 5.

In addition to the eye-witness accounts, affidavits by two experts based upon the physical evidence collected at the scene corroborate the stories of the officers. The ballistics reports and the autopsy reveal that Keesler fired his gun once while positioned in front of the truck to the passenger's side of the center of the truck. Ross Aff. ¶ 18; Matthews Aff. ¶¶ 10, 16. The bullet passed through the windshield, through Turnage's chin, and into Turnage's chest. Ross Aff. ¶ 18; Matthews Aff. ¶¶ 10, 16. Keesler's palm prints were found on the hood of Turnage's truck in a position consistent with where Keesler would have had to have stood in order to have fired the bullet which traveled through the windshield. Ross Aff. ¶ 19; Matthews Aff. ¶ 15. The ballistics reports also show that Peters fired one shot from a position just slightly in front of the driver's side door and a second shot from beside the driver's side door. Ross Aff. ¶ 20; *see* Matthews Aff. ¶¶ 11, 12, 16. One bullet struck Turnage's chest, lodging in his heart, and the other traveled through his arm. Ross Aff. ¶ 20; Matthews Aff. ¶¶ 11, 12. Additionally, tire impressions in the gravel parking lot indicate that the truck accelerated rapidly. *Id.* ¶ 21.

Plaintiffs rebut defendants' account of the incident with affidavits from Turnage's supervisors who also witnessed the incident. According to Lionel Ginn and William Scott Tyson, after Turnage jumped in his truck he drove a short distance forward up an embankment where Keesler stood with his gun drawn. Ginn Aff. ¶ 8. Keesler pounded on the truck's hood yelling at Turnage to stop. Ginn Aff. ¶ 8. Turnage then stopped and backed out of his parking space in a semicircular manner positioning his truck so that it pointed in the direction of the parking lot gate leading to the public street. Ginn Aff. ¶ 8; Tyson Aff. 7. Keesler followed the truck placing himself two to four feet from the front corner on the driver's side. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Turnage then began to drive forward and to the right, away from Officer Keesler. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. Keesler fired his gun toward Turnage and then ran beside the truck shooting again into the driver's side window. Ginn Aff. ¶ 8; Tyson Aff. ¶ 7. The affiants did not see the position of Officer Peters, but swear that he was neither behind the truck nor in danger of being hit by the truck. Ginn Aff. ¶ 9; Tyson Aff. ¶ 10.

The affidavits submitted by the parties reveal two very different versions of the events leading to the death of Turnage. Defendants' account of the incident provides a factual basis upon which the court could conclude as a matter of law that the officers acted in accordance with constitutional standards in their use of lethal force. Because the doctrine of qualified immunity requires only that the officers act reasonably in response to the information they possess regarding the surrounding circumstances, *Anderson*, 483 U.S. at 641; *Slattery*, 939 F.2d at 216, defendants' evidence that Officer Keesler was in danger

of being run over by Turnage would provide a basis for a finding of qualified immunity. Defendants' account of the events is not, however, undisputed. The affidavits of two eye-witnesses, submitted by plaintiffs, directly contravene defendants' version of the events. Specifically, plaintiffs' witnesses, who observed the entire incident, swear that Keesler stood to the driver's side of the truck as Turnage accelerated forward and to the passenger's side. Such evidence would permit this court to hold that reasonable officers would have known that the use of lethal force was unconstitutional, thereby depriving defendant officers of the defense of qualified immunity.

The court finds that the submission by plaintiffs of the affidavits of two eye-witnesses is sufficient to create a genuine issue of material fact critical to the legal determination of whether reasonable officers would have known that their actions were unconstitutional. It is of no consequence that defendants have submitted what they believe to be conclusive physical and forensic evidence in support of their version of the facts. The existence of such evidence does not automatically render contradictory eye-witness testimony worthless. Instead, the value of that evidence, as well as of that submitted by plaintiffs, turns on an assessment of credibility that only a jury can make. The court therefore holds that a reasonable jury could find the facts as alleged by plaintiffs, thereby necessitating a trial as to the facts underlying the officers' use of lethal force.

Accordingly, defendants' motion for partial summary judgment on the grounds of qualified immunity is DENIED.

This 2nd day of November, 1995.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES
DISTRICT JUDGE

I certify the foregoing to be a true
and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina

/s/ Rebecca Bowen
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO-(3)

LEONARD EDMUNDSON, ADMINISTRATOR OF THE ESTATE OF JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON) KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and) ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,

Plaintiffs,

v.

GRAHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, CHESTER HILL, Individually and

COMPLAINT
JURY TRIAL DEMANDED

(Filed Jul. 1, 1994)

in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

NATURE OF CASE

1. This is a civil action for wrongful death brought by the Estate of James Richard Turnage, deceased (hereinafter "Ricky Turnage"); for the subsequent desecration of the body of Ricky Turnage; and for violation of civil rights of Ricky Turnage and plaintiffs brought by the individually named plaintiffs seeking compensatory and punitive damages from defendants arising out of the brutal slaying of Ricky Turnage on July 2, 1992, without legal justification and in violation of the rights of Ricky Turnage and plaintiffs.

JURISDICTION

2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331, this being a civil action arising under the Constitution and laws of the United States, namely the First, Fourth, Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States and 42 U.S.C. § 1983.

3. Jurisdiction is further invoked pursuant to 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1998, this being an action to redress deprivation under the color of state law, statute, ordinance, regulation, custom, or usage of rights, privileges and immunities secured by the Constitution and the laws of the United States, namely the First, Fourth, Fifth, Eighth and Fourteenth Amendments, and pursuant to Title 42 U.S.C. § 1983.

4. The plaintiffs invoke the pendant jurisdiction of this Court to adjudicate their claims under the laws of the State of North Carolina.

PARTIES

5. At all times pertinent to this action, plaintiffs' decedent, James Richard Turnage, was a citizen of the United States and a resident of Goldsboro, Wayne County, North Carolina.

6. The plaintiff, Leonard Edmundson, is the duly appointed Administrator of the Estate of Ricky Turnage. He is a citizen of the United States and a resident of Goldsboro, Wayne County, North Carolina. Leonard Edmundson brings this lawsuit pursuant to his duty and capacity as Administrator of the Estate of Ricky Turnage to recover compensatory and punitive damages arising from the wrongful death and unreasonable slaying of Ricky Turnage resulting from the acts and omissions of defendants. As Administrator of the Estate of Ricky Turnage, Leonard Edmundson is the appropriate person to bring this action pursuant to the North Carolina Wrongful Death Act, N.C. Gen. Stat. § 28A-18-1, *et seq.*, and N.C. Gen. Stat. § 28A-13-3(23).

7. The individual plaintiff, Alene Yelverton, is the mother of the deceased, Ricky Turnage. She is a citizen of the United States and a resident of Goldsboro, Wayne County, North Carolina. The individual plaintiff, Robert Yelverton, is the deceased's stepfather. He is a citizen of the United States and a resident of Goldsboro, Wayne County, North Carolina.

8. The individual plaintiff, Erin Jannell Shirley, a minor, proceeding by and through her duly appointed guardian ad litem, Janice Stocks, is the natural daughter of the deceased. Erin Shirley and her natural mother and guardian ad litem, Janice Stocks, are citizens of the United States and reside in Eureka, Wayne County, North Carolina.

9. The individual plaintiffs, Craig Yelverton, Karen Bennett, Kathy Edmundson and Libby Peele are the siblings of the decedent. These individual plaintiffs are citizens of the United States, and Ms. Bennett and Ms. Edmundson reside in Goldsboro, Wayne County, North Carolina, and Mr. Yelverton resides in Kinston, Wayne County, North Carolina, and Ms. Peele resides in La Grange, Wayne County, North Carolina.

10. The Defendant, Graham Keesler ("Keesler"), is a citizen of the United States and a resident of Wayne County, North Carolina. At all times mentioned herein, Keesler was a duly sworn law enforcement officer employed by The City of Goldsboro, North Carolina, and by The City of Goldsboro Police Department. Defendant Keesler is sued individually and in his official capacity as an officer of The City of Goldsboro Police Department and of The City of Goldsboro, North Carolina.

11. The defendant, Daniel Peters ("Peters"), is a citizen of the United States and a resident of Wayne County, North Carolina. At all times mentioned herein, Peters was a duly sworn law enforcement officer employed by The City of Goldsboro, North Carolina, and by The City of Goldsboro Police Department. Defendant Peters is sued individually and in his official capacity as an officer of The City of Goldsboro Police Department and of The City of Goldsboro, North Carolina.

12. Upon information and belief, at times relevant to this action, Defendant James P. Morgan ("Morgan") was the duly appointed, employed, and acting Chief of Police of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, with his business address at 204 South Center Street, Goldsboro, North Carolina, 27530, and pursuant to the laws of the State of North Carolina, had general supervisory powers and responsibilities over defendants Keesler and Peters. Plaintiffs contend that defendant Morgan is liable for plaintiffs' injuries and damage based upon his own independent acts, omissions and negligence involving his own hiring practices, custom, practice, policies, procedures, training and supervision of officers Keesler and Peters, and failure to adequately prohibit or discourage foreseeable conduct.

13. Upon information and belief, at times relevant to this action, Defendant Chester Hill ("Hill") was the duly appointed, employed, and acting Chief of Police of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, with his business address at 204 South Center Street, Goldsboro, North Carolina, 27530, and pursuant to the laws of the State of North

Carolina, had general supervisory powers and responsibilities over defendants Keesler and Peters. Plaintiffs contend that defendant Hill is liable for plaintiffs' injuries and damage based upon his own independent acts, omissions and negligence involving his own hiring practices, custom, practice, policies, procedures, training and supervision of officers Keesler and Peters, and failure to adequately prohibit or discourage foreseeable conduct.

14. The defendant, The City of Goldsboro Police Department ("Goldsboro Police Department"), is an agency of the defendant municipality, The City of Goldsboro, North Carolina, and was the employer of defendants Keesler, Peters, Morgan and Hill at all times relevant to this Complaint, including on the date Keesler and Peters shot and killed Ricky Turnage while acting under the color of state title and in the course and scope of their employment. Plaintiffs contend that The City of Goldsboro Police Department is liable for plaintiffs' injuries and damage based upon principles of *respondeat superior* and based upon the Goldsboro Police Department's independent acts, omissions and negligence involving the department's own hiring practices, custom, practice, policies, procedures, training and supervision of Officers Keesler, Peters, Morgan and Hill and failure to adequately prohibit or discourage foreseeable conduct.

15. The defendant, The City of Goldsboro, North Carolina ("City of Goldsboro"), is a municipal corporation organized under and pursuant to the laws of the State of North Carolina. The City of Goldsboro created and operates The City of Goldsboro Police Department. The City of Goldsboro is the municipal corporation in whose name the defendant police officers performed all

acts and omissions alleged herein, and such acts and omissions occurred during the course of conducting the business of and attending to the affairs of defendant City of Goldsboro. Officers Keesler, Peters, Morgan, Hill and the Goldsboro Police Department were, at all times relevant to this Complaint, agents, officers and employees of The City of Goldsboro. Plaintiffs contend that The City of Goldsboro is liable for plaintiffs' injuries and damage based upon principles of *respondeat superior* and based upon The City of Goldsboro's independent acts, omissions and negligence involving its own hiring practices, custom, practice, policies, procedures, training and supervision of officers Keesler, Peters, Morgan and Hill and failure to adequately prohibit or discourage foreseeable conduct.

STATEMENT OF FACTS

16. On July 2, 1992, Ricky Turnage was a 36 year old male, a citizen of the United States and a resident of Goldsboro, Wayne County, North Carolina. Ricky Turnage was a man in excellent health for a person of his age and had a life expectancy of at least 36.85 years pursuant to N.C. Gen. Stat. § 8-46. Ricky Turnage was employed by Franklin Baking Company as a route salesman earning a net annual income of approximately $20,000.00, and he possessed a good earning capacity.

17. On July 2, 1992, Ricky Turnage was performing his duties as a route salesman for Franklin Baking Company. Mr. Turnage performed his duties out of the Franklin Baking Company warehouse located at the corner of Carolina and Grantham Streets in Goldsboro, Wayne

County, North Carolina. At the time of the incident described below, Ricky Turnage had returned to the company warehouse with a Franklin Baking Company delivery truck in order to unload the truck.

18. On July 2, 1992, defendants Keesler and Peters, as police officers employed by The Goldsboro Police Department and The City of Goldsboro and acting under the color of state title and in the course and scope of their employment with The Goldsboro Police Department and The City of Goldsboro, travelled to the Franklin Baking Company warehouse to serve an arrest warrant upon Ricky Turnage for the alleged sale and delivery of 6.8 grams of marijuana to an undercover police officer on February 13, 1992, approximately five (5) months earlier, allegedly in violation of N.C. Gen. Stat. § 90-95(a)(1).

19. Upon arriving at Franklin Baking Company, Peters and Keesler parked their vehicle in a parking space located on the south side of the company warehouse.

20. After entering the Franklin Baking Company warehouse, Keesler and Peters approached Ricky Turnage as he was beginning to unload the Franklin Baking Company delivery truck, and the officers informed Ricky Turnage that they had a warrant for his arrest. Ricky Turnage stated to the officers that they had the wrong man, and the officers asserted that they did not.

21. After informing Ricky Turnage that they had a warrant for his arrest, defendants Keesler and Peters failed to advise Ricky Turnage of his Miranda rights, failed to handcuff Ricky Turnage, failed to immediately

transport Ricky Turnage to the Goldsboro Police Department, and otherwise failed to follow proper police procedures.

22. At the time officers Keesler and Peters confronted Ricky Turnage, Ricky Turnage was unarmed and he posed no threat of death or serious physical harm to Keesler, Peters, or other persons. Ricky Turnage had never been convicted of, pleaded guilty to or pleaded nolo contendre to any crime (other than, possibly, minor traffic violations), and he had no history of violent behavior. Keesler and Peters were not acting to arrest Ricky Turnage during the commission of any crime, nor did they have reason to believe that he had committed a crime involving the use or the threatened use of force or violence.

23. Ricky Turnage inquired of officers Keesler and Peters whether he could finish unloading the Franklin Baking Company delivery truck before the officers took him downtown to The Goldsboro Police Department. Keesler and Peters told Ricky Turnage that he could do so. When Ricky Turnage's supervisors informed the officers at least twice that someone else could finish unloading the truck if the officers needed to go ahead and take Ricky Turnage downtown, the officers replied that they had "all day" and that since it would "probably be his [Ricky Turnage's] last day at work . . . we'll let him finish."

24. In order to unload the delivery truck, and as the truck was parked at the loading dock at the Franklin Baking Company warehouse, Ricky Turnage had to move

to the front of the truck to push trays of bread products to the back of the truck where he could unload the trays.

25. Initially, while Ricky Turnage was unloading the delivery truck, both Keesler and Peters stood close by and kept watch over him. However, as Ricky Turnage's work progressed, first Keesler and then Peters moved and sat down at a desk approximately 20 yards away from Ricky Turnage and the delivery truck, where they engaged in a general conversation with Ricky Turnage's supervisors for thirty to forty minutes.

26. After officers Keesler and Peters came over to the desk, and as they were talking to the supervisors, Ricky Turnage left the Franklin Baking Company warehouse through a door on the west side of the warehouse. Keesler, with his gun drawn, ran after Ricky Turnage through the same door. Peters left the warehouse through the bay doors on the south side of the warehouse near to where his police car had been parked.

27. Once he left the Franklin Baking Company warehouse, Ricky Turnage went to his personal pickup truck located in a parking lot directly across from the northwest corner of the Franklin Baking Company warehouse, immediately in front of a grassy hill that sloped away from the warehouse. Ricky Turnage got into his pickup truck, locked the doors and started the engine. At or about the same time, Keesler came to the passenger door of Ricky Turnage's truck and, with his gun drawn, demanded that Ricky Turnage stop the truck.

28. Ricky Turnage then turned the wheels of his pickup truck to the left and backed up his truck at an angle away from Keesler. As Ricky Turnage was backing up his truck, Keesler, instead of remaining in a position of safety, ran and voluntarily assumed a position in front of Ricky Turnage's truck toward the driver's side, within two or three feet of the hood. Keesler's gun was drawn and pointed at Ricky Turnage inside the truck.

29. Ricky Turnage then turned the wheels of his pickup truck to the right and began to drive his pickup truck forward away from Officer Keesler and toward the exit of the Franklin Baking Company parking lot on Carolina Street, in an effort to escape from officers Keesler and Peters. Ricky Turnage proceeded forward with the wheels of his truck cutting to the right away from officer Keesler, who was then out of the way of the truck's path. Nevertheless, when both officers were standing clear of the truck's path, and therefore in no danger of immediate physical harm, the officers fired shots which struck Ricky Turnage.

30. After Ricky Turnage was shot by defendants Keesler and Peters, the pickup truck continued in forward motion past where the officers were standing, turned onto Carolina Street and eventually struck a guy wire at the intersection of Carolina and Grantham streets, where the pickup truck then came to a stop.

31. Ricky Turnage died as a result of the shots fired by officers Keesler and Peters.

32. Prior to their terrible mishandling of the arrest of Ricky Turnage on July 2, 1992, neither Peters nor Keesler had any information indicating that Ricky Turnage was a man with a reputation for violent behavior, that Ricky Turnage had a history of violent behavior, that Ricky Turnage had ever committed a crime involving the infliction or threatened infliction of serious physical harm, or that Ricky Turnage posed a threat of death or serious physical harm to anyone if not immediately apprehended.

33. Although the defendants may have believed that Ricky Turnage had previously committed the crime alleged in their arrest warrant, the alleged possession of 6.8 grams of marijuana with the intent to sell and deliver the marijuana is not an inherently dangerous crime such that there is a great risk of harm to the officers or public if the perpetrator is not immediately apprehended. Indeed, Keesler and Peters were seeking to arrest Ricky Turnage for a non-violent offense which was alleged to have occurred approximately five (5) months earlier.

34. At the time Ricky Turnage was shot, he did not pose a threat of death or serious physical harm to either Keesler or Peters or to the public in general if he was not immediately apprehended. Ricky Turnage did not threaten anyone with a weapon; and the officers did not have probable cause to believe Ricky Turnage had committed a crime involving the infliction or the threatened infliction of serious physical harm.

35. The use of deadly force by officers Keesler and Peters upon Ricky Turnage was unreasonable, in light of

the facts and circumstances confronting Keesler and Peters, and totally without justification.

36. The actions of defendants Keesler and Peters as detailed above were done under the color of state title and in the course and scope of their duties as police officers of The Goldsboro Police Department and as agents and employees of The City of Goldsboro.

37. Before July 2, 1992, The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill knew or should have known that police officers employed by The City of Goldsboro and The City of Goldsboro Police Department had a policy, practice, and custom of using excessive force to intimidate and apprehend individuals. The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill did nothing to terminate such policies, customs and practices.

38. Before July 2, 1992, The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill knew or should have known that police officers employed by The City of Goldsboro and The City of Goldsboro Police Department had a policy, practice, and custom of deficient hiring, training and supervision of its officers. The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill did nothing to terminate such policies, customs and practices.

39. The actions of defendant police officers resulted from, and were taken because of, the aforesaid policies, practices and customs, which permitted and encouraged officers to engage in the unlawful arrest, apprehension, detention and excessive use of force. Such aforesaid policies, custom and practice further failed to adequately

discourage conduct involving unlawful arrest, apprehension, detention and excessive use of force.

40. The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill have been aware of these policies, practices, and customs for a substantial period of time and have not taken sufficient action to rectify them.

41. Defendants The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill pursued an official policy, practice and custom of: tolerating, ratifying, and failing to adequately deter and discourage the persistent, pervasive pattern of use of excessive and gratuitous force by employees of The City of Goldsboro and The Goldsboro Police Department; deliberately and knowingly failing to adequately train, discipline and supervise employees of The City of Goldsboro and The Goldsboro Police Department; and deliberately and knowingly failing to investigate and ratifying and concealing the persistent, pervasive pattern of use of excessive and gratuitous force by employees of The City of Goldsboro and The Goldsboro Police Department.

42. The foregoing acts, omissions, and systemic failures are policies, practices, and customs of The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill caused the individual defendants and other Goldsboro Police Department officers to believe that determination of the right to arrest and to use force and the amount of allowable legal force was within their discretion and that complaints of illegal arrest and use of excessive force would not be honestly or properly investigated, with the foreseeable result that officers would be

likely to illegally arrest and use improper, excessive and deadly force.

43. The aforesaid official and unofficial policies, practices and customs of The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill were and are carried out with such a reckless disregard for the consequences thereof as to amount to conscious indifference to the civil rights of individuals under their jurisdiction, including Ricky Turnage and plaintiffs.

44. As a direct and proximate result of the acts and omissions detailed in this Complaint by the defendants, Ricky Turnage and plaintiffs suffered all of the injuries detailed in this Complaint. These acts and omissions were the moving force behind, and proximate cause of, the injuries and death suffered by Ricky Turnage and the damage suffered by plaintiffs.

45. The death of Ricky Turnage was proximately caused not only by the acts and omissions of the individual defendants, but also by The Goldsboro Police Department's hiring practices, custom, practice, policies, training and failure to adequately prohibit or discourage foreseeable conduct. Thus, The Goldsboro Police Department is liable to plaintiffs based upon the Department's independent conduct, as well as under the doctrine of *respondeat superior.*

46. The death of Ricky Turnage was proximately caused not only by actions of the individual defendants, but also by The City of Goldsboro's hiring practices, custom, practice, policies, training and failure to adequately prohibit or discourage readily foreseeable conduct. Thus, The City of Goldsboro is liable to plaintiffs

based upon The City's own independent conduct, as well as under the doctrine of *respondeat superior.*

47. The acts and omissions of defendants Keesler (individually and in his official capacity), Peters (individually and in his official capacity), Morgan (individually and in his official capacity), and Hill (individually and in his official capacity), The Goldsboro Police Department and The City of Goldsboro, that are the subject matter of this Complaint, resulted in the death of Ricky Turnage, and were not only negligent, but also intentional, malicious, willful, wanton, grossly negligent, motivated by evil motive or intent, and involved reckless and callous indifference and disregard to the federally protected rights of others. The acts and omissions of defendants were further plainly incompetent and in violation of clearly established statutory and constitutional principles, laws and rights of which reasonable officials and officers would have known.

48. After being shot by officers Keesler and Peters, the decedent, Ricky Turnage, as a proximate result of the acts and omissions of defendants set forth in this Complaint, suffered personal injuries including great conscious physical pain and suffering and mental anguish during the time which elapsed between the moment he was shot and the moment of his death, during which time the decedent was aware of his injuries and impending death. The estate of Ricky Turnage is entitled to recover damages for such injuries suffered by Ricky Turnage. In addition, the estate is entitled to recover the prospective future income which Ricky Turnage would have earned but for his untimely death at the hands of defendants,

together with all other damages allowed by law, including the other damages alleged in this Complaint.

49. The individual plaintiffs have suffered and continue to suffer, as a proximate result of the acts and omissions of the defendants set forth in this Complaint, great emotional pain and anguish and other losses as a result of the brutal slaying of Ricky Turnage by defendants.

50. On July 3, 1992, after an autopsy had been performed on the body of Ricky Turnage by the office of the Chief Medical Examiner, the family members of Ricky Turnage received the body of Ricky Turnage and had the body delivered to Seymour Funeral Home in Goldsboro, North Carolina in order for the body to be prepared for burial.

51. By Saturday morning, July 4, 1992, the body of Ricky Turnage had been prepared for burial and had been placed in a coffin for viewing by family members and friends.

52. During the morning of July 4, 1992, agents and employees of The Goldsboro Police Department and The City of Goldsboro entered the premises of the Seymour Funeral Home where Ricky Turnage's casket and body were located and, without the permission or consent of any family member, and with callous disregard and indifference to the rights and feelings of the individual plaintiffs, negligently and intentionally disturbed the body of Ricky Turnage for the purpose of finger-printing the corpse.

53. The acts of the agents and employees of The Goldsboro Police Department and of The City of Goldsboro resulted in the desecration of the body of Ricky Turnage such that the individual plaintiffs suffered great emotional distress, mental suffering and mental anguish.

54. The acts and omissions of agents and employees of The Goldsboro Police Department and The City of Goldsboro on July 4, 1992 were malicious, willful, wanton, intentional, and grossly negligent. All of these acts and omissions are attributable to defendants The Goldsboro Police Department and The City of Goldsboro under principles of *respondeat superior* and by virtue of said defendants, own acts, omissions, policies and procedures.

55. At all times relevant to this cause of action, The City of Goldsboro has, through the act of purchasing liability insurance, waived its immunity from civil liability in tort for its own acts and omissions and those of the city's agencies, units, departments, officials, employees and agents, as alleged in this Complaint.

56. At all times relevant to this cause of action, any immunity from civil liability in tort for acts and omissions of defendants as alleged in this Complaint which might otherwise be applicable has been waived through the act of purchasing liability insurance.

57. All defendants are liable for the damage suffered by plaintiffs as described in this Complaint and for compensatory and punitive damages.

FIRST CAUSE OF ACTION – WRONGFUL DEATH

(State Law Negligence/Wrongful Death Claim against Graham Keesler, Individually and in his official capacity, Daniel Peters, Individually and in his official capacity, James P. Morgan, Individually and in his official capacity, Chester Hill, Individually and in his official capacity, The Goldsboro Police Department and The City of Goldsboro).

58. The plaintiffs incorporate herein by reference paragraphs 1 through 57 of the Complaint as if fully set forth herein.

59. By virtue of the wrongful acts and omissions alleged in this Complaint, the defendants are liable for the wrongful death of Ricky Turnage and for damages pursuant to N.C. Gen. Stat. § 28A-18-1 and § 28A-18-2 and other applicable North Carolina statutes.

60. The actions of defendants Keesler and Peters, in their individual as well as their official capacities, constituted an assault and battery upon the person of the decedent Ricky Turnage, such that Ricky Turnage would have been entitled to recover compensatory and punitive damages from defendants had he lived.

61. By virtue of the matters alleged herein, plaintiff Leonard Edmundson, Administrator of the Estate of James Richard Turnage, deceased, is entitled to recover from all defendants damages resulting from the wrongful death of Ricky Turnage, including the reasonable funeral expenses of Ricky Turnage; the injuries, pain and suffering of Ricky Turnage; the present monetary value of Ricky Turnage to the persons entitled to receive said damages, including but not limited to compensation for

the loss of the reasonably expected future net income of Ricky Turnage; the services, protection, care and assistance of Ricky Turnage; and the society, companionship, comfort, guidance, kindly offices and advice of Ricky Turnage and all other damages permitted by law.

62. The acts and omissions of defendants were not only negligent, but also intentional, malicious, willful, wanton and grossly negligent.

63. The estate of Ricky Turnage is entitled to recover compensatory and punitive damages from all defendants as a result of the matter alleged for the wrongful death of Ricky Turnage.

SECOND CAUSE OF ACTION

(Federal Law Claims against Graham Keesler, Individually and in his official capacity Daniel Peters, Individually and in his official capacity).

64. The plaintiffs incorporate by reference paragraphs 1 through 63 of the complaint as if fully set forth herein.

65. The defendants Graham Keesler and Daniel Peters, used a degree of force that was unreasonable, in light of the facts and circumstances confronting them, and grossly disproportionate to the need for action under the circumstances existing on July 2, 1992.

66. It was unreasonable for the defendants, Graham Keesler and Daniel Peters to discharge and fire their guns and use deadly force against the decedent, Ricky Turnage.

67. At all times described herein, defendants Keesler and Peters were acting under the color of state title.

68. The acts and omissions of defendants Keesler and Peters, as alleged in this Complaint, violated plaintiffs' rights as guaranteed under the United States Constitution and pursuant to 42 U.S.C. § 1983.

69. The acts and omissions of defendants Peters and Keesler, as alleged in this Complaint, deprived Ricky Turnage of the right to be free from unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution.

70. The acts and omissions of the defendants Keesler and Peters, as alleged in this Complaint, deprived Ricky Turnage of his life and liberty without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

71. The acts and omissions of the defendants Keesler and Peters, as alleged in this Complaint, deprived Ricky Turnage of his right to be free from physical abuse, coercion, and intimidation as guaranteed by the Eighth Amendment of the Constitution of the United States.

72. The acts and omissions of defendants Keesler and Peters, as alleged in this Complaint, violated plaintiffs' substantive due process rights not to be deprived of the society, companionship, life, love, comfort, association and support of Ricky Turnage in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

73. The acts and omissions of defendants Keesler and Peters, as alleged in this Complaint, violated plaintiffs' rights to continued familial association as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

74. The acts and omissions of defendants Keesler and Peters were in violation of clearly established statutory and constitutional principles, laws and rights of which a reasonable official and officer would have known. On July 2, 1992, reasonable and well-trained law enforcement officers knew or should have known of these principles, laws and rights, and officers Keesler and Peters were under legal obligation to protect such rights of plaintiffs and Ricky Turnage.

75. The acts and omissions of Keesler and Peters were not only negligent, but also intentional, malicious, willful, wanton, grossly negligent, plainly incompetent, motivated by evil motive or intent, and done with a reckless and callous indifference and disregard to the rights of Ricky Turnage and plaintiffs.

76. The individual plaintiffs are entitled to recover compensatory and punitive damages from defendants as a result of the matters alleged for the violation of their civil rights by defendants herein.

THIRD CAUSE OF ACTION

(Federal Law Claims Against James P. Morgan, Individually and in his official capacity, Chester Hill, Individually and in his official capacity, The Goldsboro Police Department and The City of Goldsboro).

77. The plaintiffs incorporate by reference paragraphs one 1 through 76 of the Complaint as if fully set forth herein.

78. At all times relevant to this Complaint, The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill failed to have in force or require compliance with appropriate policies and procedures for the training of and conduct by their police officers. Further, The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill failed to provide proper training and supervision for Officers Keesler and Peters, and failed to adequately train these officers in proper arrest procedures or require their compliance with proper arrest procedures.

79. The hiring practices, custom, practice, policies, police training and failure to adequately prohibit or discourage foreseeable conduct of The City of Goldsboro, The Goldsboro Police Department, Morgan and Hill were a proximate cause of the death of Ricky Turnage.

80. As a result of these acts and omissions of The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill, Ricky Turnage was brutally slain when officers Keesler and Peters used unreasonable and deadly force in their attempt to arrest and stop Ricky Turnage, as alleged in this Complaint.

81. The acts and omissions of defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill as alleged in this Complaint, violated plaintiffs' rights as guaranteed under the United States Constitution and pursuant to 42 U.S.C. § 1983.

82. The acts and omissions of defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill as alleged in this Complaint, deprived Ricky Turnage of the right to be free from unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution.

83. The acts and omissions of the defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill as alleged in this Complaint, deprived Ricky Turnage of his life and liberty without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

84. The acts and omissions of defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill, as alleged in this Complaint, deprived Ricky Turnage of his right to be free from physical abuse, coercion and intimidation as guaranteed by the Eighth Amendment of the Constitution of the United States.

85. The acts and omissions of defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill as alleged in this Complaint, violated plaintiffs' substantive due process rights not to be deprived of the society, companionship, life, love, comfort, association and support of Ricky Turnage in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

86. The acts and omissions of defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill as alleged in this Complaint, violated plaintiffs' rights to continued familial association as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

87. The acts and omissions of defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill were in violation of clearly established statutory and constitutional principles, laws and rights of which reasonable officials, officers and agencies would have known. On July 2, 1992, reasonable and well-trained law enforcement officials, officers and agencies knew or should have known of these principles, laws and rights, and defendants The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill were under legal obligation to protect the such rights of plaintiffs and Ricky Turnage.

88. The respective acts and omissions of The Goldsboro Police Department, The City of Goldsboro, Morgan and Hill as alleged in this Complaint were not only negligent, but also intentional, malicious, willful, wanton, grossly negligent, plainly incompetent, motivated by evil motive or intent and involved reckless and callous indifference and disregard of the federally protected rights of others including Ricky Turnage and plaintiffs.

89. Plaintiffs are entitled to recover compensatory and punitive damages from defendants The Goldsboro Police Department and The City of Goldsboro, Morgan and Hill as a result of the matters alleged herein, as prayed for in this Complaint.

FOURTH CAUSE OF ACTION

(Emotional Distress Claims against Graham Keesler, Individually and in his official capacity, Daniel Peters, Individually and in his official capacity, James P. Morgan, Individually and in his official capacity, Chester Hill, Individually and in his official capacity, The Goldsboro Police Department and The City of Goldsboro).

90. The plaintiffs incorporate by reference paragraphs one 1 through 89 of the Complaint as if fully set forth herein.

91. Shortly after their son was shot, plaintiffs Alene Yelverton and Robert Yelverton learned that their son had been brutally shot and that his body had been mutilated. The impact of this disclosure had a devastating emotional effect upon the plaintiffs Alene and Robert Yelverton. The plaintiffs have suffered injuries such as sickness, helplessness, and frailty and they have undergone much emotional grief, worry and stress, loss of enjoyment of life, and depression which has required medical and psychiatric intervention and care.

92. It was reasonably foreseeable by defendants Keesler, Peters, Morgan, Hill, The Goldsboro Police Department and The City of Goldsboro or it should have been foreseeable by the defendants, that their acts and omissions would cause such injury and severe emotional distress to plaintiffs Alene Yelverton and Robert Yelverton as herein complained of.

93. As a result of the acts and omissions of defendants Keesler, Peters, Morgan and Hill as imputed by operation of law to the defendants The Goldsboro Police

Department and The City of Goldsboro, and the independent acts and omissions of Morgan, Hill, The Goldsboro Police Department and The City of Goldsboro, plaintiffs Alene Yelverton and Robert Yelverton are entitled to recover from defendants both compensatory and punitive damages.

FIFTH CAUSE OF ACTION

(Claim for Desecration of Body against The Goldsboro Police Department and The City of Goldsboro).

94. The plaintiffs incorporate by reference paragraphs 1 through 93 of the Complaint as if fully set forth herein.

95. The agents and employees of defendants The Goldsboro Police Department and The City of Goldsboro negligently and intentionally desecrated the body of Ricky Turnage, thereby causing plaintiffs further serious mental suffering.

96. The acts and omissions of the agents and employees of defendants. The Goldsboro Police Department and The City of Goldsboro were intentional, malicious, willful, wanton and grossly negligent.

97. The individual plaintiffs are entitled to recover compensatory and punitive damages from defendants The Goldsboro Police Department and The City of Goldsboro as the result of the desecration of the body of Ricky Turnage by the agents and employees of said defendants.

WHEREFORE, the plaintiffs pray unto the Court that:

1. The plaintiff, Leonard Edmundson, as Administrator of the Estate of James Richard Turnage, have and recover compensatory damages from the defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) for the wrongful death and assault and battery of James Richard Turnage.

2. The plaintiff, Leonard Edmundson, as Administrator of the Estate of James Richard Turnage, have and recover punitive damages from the defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) for the wrongful death and assault and battery of James Richard Turnage.

3. The plaintiffs have and recover compensatory damages from the defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) for the violation of their civil rights and the civil rights of James Richard Turnage as guaranteed by the Constitution of the United States and 42 U.S.C. § 1983.

4. The plaintiffs have and recover punitive damages from the defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) for the violation of their civil rights and the civil rights of James Richard Turnage as guaranteed by the Constitution of the United States and 42 U.S.C. § 1983.

5. The plaintiffs, Alene and Robert Yelverton, have and recover compensatory damages from the defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) as the result of the severe emotional distress which they have suffered as a result of the acts of defendants.

6. The plaintiffs, Alene and Robert Yelverton, have and recover punitive damages from the defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) as the result of the severe emotional distress which they have suffered as a result of the acts of defendants.

7. The individual plaintiffs have and recover compensatory damages from defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) for the desecration of the body of James Richard Turnage.

8. The individual plaintiffs have and recover punitive damages from defendants in a sum in excess of Ten Thousand and 00/100 Dollars ($10,000.00) for the desecration of the body of James Richard Turnage.

9. The plaintiffs have and recover such other and further relief the Court may deem just and proper.

10. Plaintiffs demand a trial by jury on all issues of fact.

This the 1 day of July, 1994.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ James K. Dorsett, III
James K. Dorsett, III
State Bar No. 7695
Steven M. Sartorio
State Bar No. 10026
P.O. Box 2611
Raleigh, North Carolina 27602
(919) 821-1220
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON, KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,

Plaintiffs,

v.

GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro,

AFFIDAVIT OF WILLIAM SCOTT TYSON

(Filed Jan. 13, 1995)

North Carolina, CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

The undersigned, being first duly sworn, deposes and says that:

1. My name is William Scott Tyson, and I live at 489 Potts Road, Dudley, North Carolina. I am employed as a supervisor at Franklin Baking Company in Goldsboro.

2. In submitting this affidavit to the Court, it is my intention to be a completely impartial and unbiased witness and not to side with either party in this litigation. I have been interviewed by counsel for plaintiffs and I have been interviewed by representatives from the Goldsboro Police Department, and I have provided to each the same accounting of what I observed at the time of the death of James Richard ("Ricky") Turnage.

3. I was Ricky Turnage's immediate supervisor for over three (3) years. Mr. Turnage was a good employee and had never missed a day's work while I was his supervisor.

4. On July 2, 1992 at approximately 11:00 a.m., I returned to the Franklin Baking Company warehouse from Mt. Olive, where I had been on business. Lionel Ginn, another supervisor, approached me and told me that he had gotten a message that someone should call Officer Graham Keesler of the Goldsboro Police Department when Ricky Turnage returned to the warehouse from making his deliveries. Lionel went on to say that Mr. Turnage was not to be notified about what was going on.

5. When I saw Mr. Turnage drive his delivery truck into the Franklin Baking Company lot, I called Officer Keesler to advise him that Mr. Turnage had arrived back at the warehouse. About five minutes later, Officers Keesler and Peters arrived at the warehouse and entered the building where Lionel Ginn and I were standing. The officers asked where the "boss" man was, and I explained to them that both Lionel and I were supervisors. They then asked where Ricky Turnage was, and I then walked with the officers to where Mr. Turnage was working. Mr. Turnage had backed his delivery truck into the warehouse and he was unloading the truck. Mr. Turnage was then told by the officers that they had a warrant for his arrest for the possession and sale of marijuana. Mr. Turnage replied, "Not me," and the officers said, "Yes, you." Mr. Turnage then asked if he could unload his truck before he was taken from the warehouse, and the officers said he could. Lionel Ginn and I then sat down at the desk located outside the office area in the warehouse, approximately 30-35 feet from where Mr. Turnage's delivery truck was located. We sat there, waited and watched.

6. At first, the officers stayed with Mr. Turnage while he unloaded his truck, one on each side of the truck. After about 15 minutes, Officer Keesler came to the desk where Mr. Ginn and I were sitting and started a conversation. I asked Officer Keesler why Mr. Turnage was being arrested, and he told me that Ricky had sold some marijuana to an undercover agent. After 35-40 minutes had passed, Officer Peters also came over to the desk area and sat down and joined in the conversation I was having with Mr. Ginn and Officer Keesler. A short time later, one of the officers yelled, "There he goes." I never saw Mr. Turnage leave the warehouse, but I saw the door on the west side of the building closing behind him. Officer Keesler then ran out of the same door behind Mr. Turnage. Officer Peters ran out of the bay door on the south side of the building in a direction toward the gate to the warehouse parking area leading to Carolina Street. Mr. Ginn and I ran out the door on the west side of the warehouse behind Officer Keesler.

7. As I went out of the door onto the sidewalk, I could see that Mr. Turnage was already in his pickup truck and Officer Keesler was on the passenger side of the truck. Officer Keesler held his pistol out in his right hand, and with his left hand he was trying to open the passenger door. Officer Keesler was telling Mr. Turnage to stop. Mr. Turnage started his truck, put it in reverse, and backed his truck up in a rightward, semi-circular manner. Mr. Turnage stopped with the front of his pickup truck facing the gate leading from the warehouse parking lot onto Carolina Street. At this time Officer Keesler ran at an angle to the front driver's side of Mr. Turnage's truck and yelled for Mr. Turnage to stop. Officer Keesler

was less than three feet in front of Mr. Turnage's truck. Officer Keesler still held his pistol in his right hand. As Mr. Turnage then drove forward and rightward toward the parking lot exit, Officer Keesler pushed off the truck and moved over to the driver's side of the truck out of the path of the truck. Ricky was still driving his truck forward and to his right, away from where Officer Keesler was positioned. Officer Keesler then shot into the vehicle through the driver's side window.

8. Mr. Turnage did not drive his pickup truck toward Officer Keesler after Officer Keesler stepped to the driver's side of the truck. Officer Keesler was not in danger of being struck by the truck and his life was not in danger at the time he shot Ricky Turnage, as the truck was moving away from him and toward the parking lot exit. If Officer Keesler's life was ever placed in danger, it was when he ran in front of the moving vehicle, before he fired his gun through the driver's side window after he moved out of the way of the truck.

9. After the shooting, Mr. Turnage's vehicle went out of the gate, past Officer Peters and onto Carolina Street. Officer Keesler followed the truck out of the parking lot on foot.

10. I am not sure exactly where Officer Peters was when Officer Keesler shot Ricky Turnage, but I remember that he was somewhere close to the area of the parking lot where the gravel pavement meets the asphalt near the parking lot gate. I did not see Officer Peters behind Ricky's pickup truck and he was not in danger of being hit by the truck when Officer Keesler fired.

11. Following the incident, I walked across Carolina Street where I saw Mr. Franklin, Sr., who wanted to know what was going on. I told Mr. Franklin about what had happened. Mr. Franklin and I then rode to the intersection where Mr. Turnage's truck had struck the guy wire.

12. After the accident, I had a chance to examine the Franklin Bakery parking lot. I saw mirrored glass on the parking lot in the area where Mr. Turnage stopped his truck after he had backed up and before he started forward.

Further this affiant sayeth not.

This the 10th day of January, 1995.

/s/ William Scott Tyson
William Scott Tyson

Sworn to and subscribed before me, this the 10th day of January, 1995.

/s/ Tricia S. Mullward
Notary Public

(SEAL)

My Commission Expires:
4-29-95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON, KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,

Plaintiffs,

v.

GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro,

AFFIDAVIT OF LIONEL GINN

(Filed Jan. 13, 1995)

North Carolina, CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina, THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

The undersigned, being first duly sworn, deposes and says that:

1. My name is Lionel Ginn, and I live at 3979 Central Heights Road, Goldsboro, North Carolina. I am a supervisor at the Franklin Baking Company in Goldsboro, North Carolina.

2. In submitting this affidavit to the Court, it is my intention to be a completely impartial and unbiased witness and not to side with either party in this litigation. I have been interviewed by counsel for plaintiffs and I have been interviewed by representatives from the North Carolina State Bureau of Investigation and the defendants' attorneys, and I have provided to each the same accounting of what I observed at the time of the death of James Richard ("Ricky") Turnage.

3. On July 2, 1992, I was employed as a supervisor by Franklin Baking Company at their warehouse in

Goldsboro, North Carolina. I was called by Carl Wadsworth, a fellow employee, to his office. Mr. Wadsworth handed me a piece of paper with Officer Keesler's name and telephone number on it with instructions to call Officer Keesler when Mr. Turnage returned to the warehouse from making his deliveries. Mr. Wadsworth told me not to tell Mr. Turnage anything about the call. Sometime later, Mr. Turnage's direct supervisor, Scott Tyson, came in and I gave the information to him.

4. At approximately 1:15 p.m. on the same date, Mr. Turnage backed his Franklin Baking Company delivery truck into the warehouse, at which time Mr. Tyson placed a call to Officer Keesler. About five minutes later, two police officers, Officer Keesler and Officer Peters, came into the warehouse, approached Mr. Tyson and me and asked if we were "boss men." I told them we were, and the officers then asked where Mr. Turnage was. Mr. Tyson said, "Right there," and pointed toward Mr. Turnage, who was standing at the back of his delivery truck. I then followed the officers and Mr. Tyson over to where Mr. Turnage was standing. I heard Officer Keesler tell Mr. Turnage that he had a warrant for his arrest for selling marijuana. Mr. Turnage replied by saying, "You've got the wrong man," and the officer replied, "No, we don't." Mr. Turnage asked the officers if he could finish unloading his delivery truck, and they replied that they had "all day" and that it would be "fine" for Ricky to unload his truck. Mr. Turnage then started unloading his truck. At first the officers stood near the truck and watched him.

5. After a while, one of the officers, Officer Keesler, came to the desk area and started a conversation with Mr.

Tyson and me. A little while later, the other officer, Officer Peters, joined us. Every once in a while, Mr. Turnage would walk to the front of his truck, and Officer Peters would go over to see what he was doing. Mr. Tyson told the officers at least two (2) times that if they wanted to go ahead and take Mr. Turnage downtown, someone else would finish unloading the truck. One of the officers replied that it would "probably be his [Mr. Turnage's] last day at work, so we'll let him finish."

6. After a while, both officers stopped paying much attention to what Mr. Turnage was doing. Instead, the officers were in the desk area, about 30-35 feet away from Mr. Turnage's truck, engaged in general conversation with Mr. Tyson and me. A while later, I was leaning back in my chair talking to the officers, and I heard Officer Peters say, "There he goes." I saw Ricky Turnage run out of the door on the west side of the warehouse leading towards the gravel parking lot on which his personal pickup truck was parked with its front facing the warehouse. Officer Peters turned and ran out of the bay doors on the south side of the building. Officer Keesler also ran out of the warehouse, using the same door that Mr. Turnage had run out of. By the time he reached the door, Officer Keesler already had his gun in his hand, and he ran out of the door with his gun drawn. Both Scott and I followed Officer Keesler out of the door towards the area where Ricky's pickup truck was parked.

7. By the time I got out the door and onto the walkway that leads down the hill to the parking area, I saw that Mr. Turnage had already gotten into his truck. Mr. Turnage's truck was parked to my right with its front

facing the warehouse as I stood on the walkway, approximately 65 feet away. I could see that Mr. Turnage had locked the doors and was starting his engine. Scott Tyson was standing next to me. I saw Officer Keesler at the passenger side of the pickup truck trying to open the truck's door. Officer Keesler was also yelling for Mr. Turnage to stop his truck. Keesler still had his gun in his hand.

8. Because of where he had parked his pickup truck and because the parking lot is fenced in, the only way for Mr. Turnage to leave the lot was to drive toward the parking lot gate leading to Carolina Street. Once Mr. Turnage got his vehicle started, he drove his truck forward a short distance up the embankment. By this time, Officer Keesler had moved to the front of Ricky's truck, within two to three feet of it. Officer Keesler stood in front of the truck with his gun in his hand pointed at the windshield yelling, "Stop, stop, stop." He hit the hood of the truck several times with his other hand. Ricky then stopped his truck and backed up in a semi-circular manner so that the front of his truck was then facing the gate exiting the parking lot. Officer Keesler followed Ricky's truck as Ricky drove his truck backwards and came to a position near the front corner of the truck, on the driver's side, again two to three feet from the truck. Mr. Turnage then began to drive his truck forward and rightward towards the gate leaving the parking lot. The motion of the pickup truck and Officer Keesler's movements put Officer Keesler to the right side/driver's side of the truck. At this point in time, Officer Keesler was completely out of the way of the pickup truck as it moved forward and rightward toward the parking lot gate. As

Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's side window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot his gun, Officer Keesler was not in danger of being hit by the truck. I could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage. I saw Mr. Turnage in his truck as he went by. It looked like Mr. Turnage had been hit by a bullet because of the way he was slumped over. Mr. Turnage's truck kept moving forward, and he drove his truck out of the parking lot through the gate and drove up Carolina Street. His pickup truck struck a guy wire on the right side of Carolina Street and came to a stop.

9. During this time, while I do not know precisely where Officer Peters was or if he fired his weapon, he was never in my field of vision as I witnessed these events and saw Ricky being shot. Officer Peters was not behind Ricky's truck. I saw Ricky's truck leave the parking lot. As it left the lot, I saw Officer Peters near the front gate of the parking lot leading onto Carolina Street.

10. I saw Mr. Franklin outside the gate. Mr. Franklin asked me, "What the hell is going on." I told Mr. Franklin that the police had just shot Ricky Turnage.

11. After the incident, I went back and looked at the parking lot. There was a lot of glass from Mr. Turnage's truck in the area where Mr. Turnage had stopped after backing his truck up.

Further this affiant sayeth not.

This the 10th day of January, 1995.

/s/ Lionel Ginn
Lionel Ginn

Sworn to and subscribed before me, this the 10th day of January, 1995.

/s/ Tricia S. Mullward
Notary Public

(SEAL)

My Commission Expires:
4-29-95

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO.: 5:94-CV-467-BO(3)

LEONARD EDMUNDSON, Administrator of the Estate of JAMES RICHARD TURNAGE, Deceased; ALENE ROUSE YELVERTON, ROBERT YELVERTON, CRAIG YELVERTON, KAREN BENNETT, KATHY EDMUNDSON, LIBBY PEELE, and ERIN JANNELL SHIRLEY, a Minor, By and Through Her Guardian Ad Litem, JANICE STOCKS,

Plaintiffs,

v.

GRAYHAM KEESLER, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina; DANIEL PETERS, Individually and in his official capacity as an Officer of The City of Goldsboro Police Department and The City of Goldsboro, North Carolina; JAMES P. MORGAN, Individually and in his capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro,

AFFIDAVIT OF PAT JOHNSON MATTHEWS

(Filed Dec. 16, 1994)

North Carolina; CHESTER HILL, Individually and in his official capacity as Police Chief for The City of Goldsboro Police Department and The City of Goldsboro, North Carolina; THE CITY OF GOLDSBORO POLICE DEPARTMENT and THE CITY OF GOLDSBORO, NORTH CAROLINA, a municipal corporation organized under and pursuant to the laws of the State of North Carolina,

Defendants.

NOW COMES the Affiant, Pat Johnson Matthews, and after being duly sworn, deposes and says:

1. I am Pat Johnson Matthews and I am competent to make the statements contained herein based upon my own personal knowledge.

2. I am employed as a Special Agent II with the State Bureau of Investigation (hereinafter "SBI"). I was the investigative officer on the scene of the Turnage incident on July 2, 1992.

3. I have been a SBI Agent since March 13, 1986. On July 2, 1992, I held the rank of Special Agent II, having been previously promoted from Special Agent I and Agent Trainee. I have been trained in many types of law enforcement investigative matters. I have attended numerous classes at the SBI training facility near Garner, North Carolina and have taken several classes at the North Carolina Justice Academy in Salemburg, North

Carolina concerning investigative techniques and procedures. I have been trained to reconstruct facts from physical evidence to substantiate or refute a suspect's version of events.

4. My job for approximately six years preceding the Turnage incident was criminal investigations. I approached the Turnage incident as a criminal investigation of Officers Keesler and Peters.

5. On July 2, 1992, I was at the Goldsboro Police Department when a call came into the Department concerning the shooting of Mr. Turnage. I arrived on the scene approximately fifteen minutes after being advised of the shooting.

6. When I arrived on the scene, I immediately took charge and began my investigation. The scene where the truck wrecked was already secured, but I, pursuant to my training, made sure that it was secured according to SBI standards. I also secured the area in the Franklin Baking Company warehouse parking lot where the shooting occurred.

7. The reports and drawings attached as Exhibit A are true and accurate copies of the reports and drawings I drafted or that I received during my investigation into the shooting incident. These documents are protected by State statute and are presented in this action only because a Protective Order has been entered by the Court allowing presentation of these documents in this action and protecting them from general dissemination. By presenting them, I do not waive any of the protections covering these documents or any other SBI documents or information.

8. The term "homicide" in the reports means simply that a death has occurred and the death is the subject of a criminal investigation. It is not a conclusion that a wrongful slaying has occurred.

9. A total of three bullets were fired during the incident. All three bullets entered the truck from outside of it. There were no holes indicative of bullets exiting the truck except for the one bullet lodged in the passenger's door, which is discussed below. (This bullet did not produce a hole leading to the outside of the truck.) All three bullets were recovered.

10. By the way the glass was broken, the bullet hole in the windshield was an entry hole coming from outside of the truck. The bullet hole in the windshield, the general location of the body in the driver's seat, and the location of the bullet holes in the chin and underneath the chin in the chest just left of the center of the body created a line coming from the front of the truck, just right of the truck's front center, towards the passenger's side. There was no exit hole behind or surrounding Mr. Turnage or marks indicating a ricochet that could otherwise account for the bullet entering the windshield and exiting through the portion of the window broken out by Officer Keesler to turn off the truck's engine after the truck wrecked or vice versa. In light of the angle at which the bullet struck the windshield, the way the glass broke, and the angle of the wound to Mr. Turnage's chin and the corresponding wound in his chest, the bullet that entered the truck through the windshield was the one that struck Mr. Turnage in the chin and traveled slightly left into his chest. A bullet from the driver's side would have tended to travel from left to right, instead of straight and slightly from

right to left as did the bullet entering from the windshield.

11. Another bullet, which entered from the driver's side, struck Mr. Turnage around his left nipple, transversed his body from left to right, and lodged in the right side of his body.

12. As mentioned above, there was one bullet hole in the passenger's door and a bullet found in this door. This bullet did not fully penetrate the door. This bullet came from the driver's side and was the one that struck Mr. Turnage in the right arm before lodging in the passenger's door.

13. A thorough examination of the truck was conducted for evidence, including indications of additional bullets fired especially from the broken out portion of the driver's window, but there were absolutely no other bullets, bullet holes, traces of bullets, etc. found.

14. Attached as Exhibit B are true and accurate copies of pictures I took concerning the scene of the Turnage incident just after it occurred. I was in the plane that took the aerial photograph a few days later, and it too is a true and accurate copy. The skid marks in the gravel parking lot demonstrate that the truck backed quickly and then accelerated forward and to the right. The aforementioned line ending at the bullet wounds in Mr. Turnage's chin and underneath his chin in his chest and travelling back through the windshield towards the front of the truck indicate that a person who was standing at the front of the truck when Mr. Turnage began accelerating the truck forward would have been in danger of being run over, could have perceived that the truck

was going to run over him, and could have fired while perceiving that his life was in danger or that he was at risk of receiving serious bodily injuries from the truck.

15. Officer Keesler's left palm print was found on the hood of the truck in the exact position corresponding to where a left hand may have been while the right hand was holding the weapon that fired the bullet through the windshield.

16. The ballistics reports, attached with the documents and report in Exhibit A, demonstrate that the Officers fired the bullets that they claimed to have fired in their statements to the SBI on the day of the incident.

17. Attached as Exhibit C are true and accurate copies of the autopsy reports that the SBI received from the North Carolina Medical Examiner's Office ("Medical Examiner").

18. After receiving the autopsy reports from the Medical Examiner, I realized that the Medical Examiner did not take full hand and fingerprints (major case prints) of Mr. Turnage. I learned that the person at the Medical Examiner's Office who usually takes such prints was off-duty when the autopsy was performed.

19. Sgt. Melvin of the Goldsboro Police Department and I went to the Seymour Funeral Home where Mr. Turnage's body was located. Mr. Gary Taylor, a funeral director at the Funeral Home, gave us permission to obtain these major case prints from Mr. Turnage's body.

20. Mr. Taylor also told us that visitation would be soon so we would have to hurry, but that he would make sure the ink was cleaned from Mr. Turnage's hands before

viewing by Mr. Turnage's family and friends. We then took the major case prints.

21. When I viewed the body before taking the prints, I noticed dried blood on the hands and arms remaining after the autopsy. I was surprised that the Funeral. Home had not already cleaned the body. I thought that the Funeral Home would have to clean the body anyway after the major case prints were taken because of this dried blood.

22. While Sgt. Melvin and I took the major case prints and after we finished, I viewed the hands of Mr. Turnage. In particular, the ink did not mutilate the skin or otherwise cause it to deteriorate during the times that I observed it. I have never had fingerprinting ink to mutilate or eat through skin and I do not believe that this ink mutilated the body of Mr. Turnage.

23. After taking the prints, Sgt. Melvin and I left the Seymour Funeral Home. I left believing that one of its employees would clean the hands as promised.

24. At all times relevant to this Affidavit, I executed the duties of my office in good faith with an eye towards gathering the evidence from the Turnage incident as thoroughly, accurately, and objectively as possible. From the evidence I gathered, it was clear to me as a SBI Special Agent II trained to conduct these investigations that the Officers fired their weapons while Officer Keesler's life was in danger from Mr. Turnage driving his truck towards Officer Keesler at a fast rate of acceleration.

Further Affiant saith naught.

Attested to, this 2nd day of December, 1994.

/s/ Pat Johnson Matthews
Pat Johnson Matthews

Sworn to and subscribed before me,
this 2nd day of December, 1994.

/s/ Kimberly D. Jones
Notary Public

My Commission Expires: 12-29-96

No. 96-1585 (3)

Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1996

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage; ARLENE ROUSE YELVERTON; ROBERT YELVERTON; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks,

Petitioners,

v.

GRAYHAM KEESLER; DANIEL PETERS; JAMES P. MORGAN; CHESTER HILL; and CITY OF GOLDSBORO, NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

James K. Dorsett, III*
***Counsel of Record**
Steven M. Sartorio
Zebulon D. Anderson
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602-2611
(919) 821-1220

WYERS PRINTING COMPANY 7th & Franklin Bldg Richmond,Virginia 23219 (804) 648-3664

6 pp

ARGUMENT

I. The Decision of the Fourth Circuit Conflicts with Johnson v. Jones.

In their Brief in Opposition, the respondents argue that "[t]he situation facing Keesler, as presented by Petitioner's evidence, was a tense, rapidly evolving crisis in which Keesler, in serious danger of injury, fired his weapon while positioned within two to three feet of a rapidly moving vehicle driven by a felony suspect determined to escape." (Br. in Opp. at 14.) Based upon this characterization of the petitioners' evidence, the respondents justify the killing of Ricky Turnage.

The respondents, however, like the Fourth Circuit, have mischaracterized the petitioners' evidence. In his affidavit, eyewitness Lionel Ginn describes Turnage's flight as follows:

> At this point in time, Officer Keesler was completely out of the way of the pick-up truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot the gun, Officer Keesler was not in danger of being hit by the truck. I

> could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage.

Considering this affidavit and the remaining evidence in the light most favorable to the petitioners, the trial court concluded that no reasonable officer in the position of Keesler or Peters could have believed that he had probable cause to believe that Turnage posed a significant threat of death or serious physical injury and, therefore, rejected the defendants' qualified immunity defense and denied their motion for summary judgment because a genuine issue of material fact existed regarding the conduct of the defendant officers.

In its decision, the Fourth Circuit ignored Ginn's affidavit and it failed to consider the facts in the light most favorable to the petitioners when it concluded that the officers' conduct "was objectively reasonable" because Keesler "was in serious danger of injury" during this incident, as he was "within two to three feet of a rapidly moving truck." By substituting its interpretation of the affidavits submitted by the petitioners for that of the district court and by failing to consider the complete picture drawn by these affidavits, the Fourth Circuit, as recognized by Judge Hall in dissent, exceeded its authority under Johnson v. Jones, ___ U.S. ___, ___, 115 S. Ct. 2151, 2159, 132 L. Ed. 2d 238, ___ (1995).

In their Brief in Opposition, the respondents discuss the affidavits of Keesler, Peters, two eyewitnesses who they claim support their position, two experts they retained, and an agent of the State Bureau of Investigation (the "SBI") as support for their version of the events that took place on July 2, 1992. Indeed, the

defendants have included the affidavit of the SBI agent in an appendix to their Brief in Opposition. Of course, to the extent these affidavits contradict the affidavits of Tyson and Ginn, they are irrelevant at this stage of the litigation, as the district court recognized when it stated as follows:

> It is of no consequence that defendants have submitted what they believe to be conclusive physical and forensic evidence in support of their version of the facts. The existence of such evidence does not automatically render contradictory eye-witness testimony worthless. Instead, the value of that evidence, as well as of that submitted by plaintiffs, turns on an assessment of credibility that only a jury can make.

II. The Decision of the Fourth Circuit Conflicts with Tennessee v. Garner and Decisions of the Seventh and Ninth Circuits.

The Fourth Circuit in this case concluded that the officers were entitled to a qualified immunity, not because the relevant law was unclear, but because the officers did not violate the law at all. Under the Fourth Circuit's decision, police officers who shoot and kill a felony suspect who is attempting to flee by automobile do not violate the Constitution as long as they are within close proximity (two to three feet) of the automobile when they shoot. Such a holding is contrary to this Court's decision in Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), and sets a dangerous, in fact lethal, precedent.

The respondents dismiss the petitioners' argument that this case sets a dangerous precedent by asserting that the petitioners "would extend this opinion to allow police officers to run beside and shoot at a vehicle driven by a fleeing suspect, regardless of whether the officer is within two to three feet of the vehicle, regardless of whether it is rapidly moving and regardless of whether the situation is a tense and uncertain one." (Br. in Opp. at 15.) The petitioners, however, make no such argument. Instead, the petitioners' position is that, even if a police officer is within two to three feet of an escaping vehicle, even if the vehicle is rapidly moving away from the police officer, and even if the situation is tense and uncertain, the officer is not automatically entitled to shoot and kill the driver of the vehicle, particularly when unbiased witnesses have observed that the officer was not in danger at the time he shot.

Under the Fourth Circuit's decision, however, a police officer who is in close proximity to a rapidly moving vehicle driven by a fleeing felon may shoot and kill the driver of the vehicle, regardless of the direction in which the vehicle is moving, regardless of whether the underlying crime was accomplished violently, regardless of whether the escape involving menacing a police officer or a civilian with a weapon, regardless of whether the officer could have moved safely out of the way of the vehicle, regardless of whether the officers knew that the fleeing suspect had no prior criminal record, and regardless of whether eyewitnesses have submitted affidavit testimony that the police officers were not in danger when they shot and killed the driver of the vehicle. This decision sets a dangerous precedent and is inconsistent with this Court's decision in Tennessee v.

Garner, the decision of the Seventh Circuit in Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993), and the decision of the Ninth Circuit in Acosta v. City and County of San Francisco, 83 F.3d 1143 (9th Cir. 1996).

CONCLUSION

Two eyewitnesses in this case have sworn under oath that Keesler and Peters were in no danger when they shot and killed Turnage as he attempted to drive away from them. These eyewitnesses could not believe what they saw when Keesler and Peters shot Turnage. If these sworn statements are truthful, and at this stage of the litigation they must be deemed truthful, then the conduct of Keesler and Peters was unlawful. By failing to consider these affidavits, by ignoring the facts relied upon by the district court, by failing to consider all of the facts surrounding this incident in the light most favorable to the plaintiffs, and by concluding that Keesler and Peters, as a matter of law, before any discovery has been conducted, acted reasonably in this situation, the Fourth Circuit has rendered a decision that is contrary to law, that sets dangerous precedent, and that this Court should consider and reverse.

James K. Dorsett, III
Steven M. Sartorio
Zebulon D. Anderson
SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602
(919) 821-1220